

Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little

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The last quarter of the 20th century produced dramatic changes in the legal landscape with respect to the resolution of legal disputes. Courts began to offer procedures that served as alternatives to the then-default trial. Today, disputes are increasingly being transferred from court dockets to mediation,¹ arbitration,² or some other alternative dispute resolution ("ADR") procedure that is "court-connected," or required or advised by the court. Although the growth in court-connected ADR has undoubtedly changed how judges work

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¹ In mediation, a neutral third party assists disputants to reach a negotiated settlement of their differences. The mediator is not empowered to render a decision or to make findings of fact. LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 15 (3d ed. 2005).

² Typically significantly more formal than mediation, arbitration involves the submission of a dispute to a third party (or a panel of third parties) who acts as a fact-finder and renders a decision after hearing arguments, including opening and closing statements, and reviewing evidence. RISKIN ET AL., *supra* note 1, at 14. Unlike private arbitration, in which the decision typically is binding, court-connected arbitration produces non-binding outcomes. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 188 (2003).

by reducing trial rates³ and changed the way that lawyers represent their clients, ADR affects no one more significantly than the disputants themselves. The disputants—more than anyone else—must endure the psychological, financial, and other consequences of the outcomes that are reached.⁴ And yet, their ability to influence how their disputes are resolved is often co-opted by the courts to which they turn for assistance. Disputants' ability to exercise their preferences⁵ with respect to which procedures courts make available to them, or to tailor a given procedure to the particular needs of their dispute, is extremely limited and, in many instances, altogether non-existent. Disputants' autonomy is particularly co-opted in courts that offer but a single ADR procedure, and even more so in courts that make that single procedure a mandatory prerequisite to trial.⁶

³ Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, 10 NO. 4 DISP. RESOL. MAG. 3, 3–4 (2004) (noting a 60% decline in the absolute number of trials since the mid-1980s and arguing that increased use of ADR procedures might have contributed to this phenomenon).

⁴ This Article focuses on civil law disputants who have little direct experience with the legal system—typical contemporary civil disputants whose choices have not been circumvented by a priori contractual commitments to a given procedure, such as through an arbitration clause.

⁵ In this Article, the terms "party," "disputant," and "litigant" are intended to refer to the same subset of legal actors and are used interchangeably. Also, the term "preference" is intended to be a close kin of "control" in the sense that allowing disputants to exert their preferences (individually or as a collective when aggregate preferences are deduced from research and implemented by courts) implies that they have either exerted some direct or indirect control over program design, or have had some ability to shape a procedure to suit the particular needs of their dispute.

⁶ Mandatory programs require parties to participate in ADR, and fail to settle, before they are permitted to have a trial on the merits. Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 308–09 (2004). Voluntary programs, by contrast, offer parties a choice between ADR or trial from the time of filing. Ari Davis, Note, *Moving From Mandatory: Making ADR Voluntary in New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283, 295 (2006). Many court programs offer a single ADR procedure, and some of these programs are mandatory. See, e.g., ELIZABETH PLAPINGER & DONNA STIENSTRA, A JOINT PROJECT OF THE FED. JUDICIAL CTR. & CPR INSTITUTE FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 14–19, tbl.1 (1996) (providing examples of district courts that offer a single form of ADR: D. Ariz. (voluntary non-binding arbitration); E.D. Cal. (early neutral evaluation); D. Vt. (early neutral evaluation); D.D.C. (mediation); and E.D. Texas (mediation)). Early neutral evaluation in the District of Vermont and the Northern District of California is mandatory for certain types of cases. *Id.* at 50–53, tbl.5. See also Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but*

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This Article argues that courts should aim to gain greater clarity about disputants' preferences, and work to deliberately implement those preferences. To achieve these ends, several factors must align: courts must be more open to advancing party self-determination, empirical research must more clearly and reliably illuminate disputants' aggregate preferences than it has to date, and courts must commit to relying on such research findings to avoid the pitfalls associated with relying on intuition. Even before empirical research clarifies aggregate preferences, courts can advance the implementation of disputant preferences by giving disputants some autonomy to shape the procedure they will use for their dispute.

With this potential union between research and court policy as a backdrop, my argument has three parts. First, I present an analytical thesis. I begin by explaining that court-connected ADR programs encompass several types of goals, some individual and focused primarily upon augmenting disputant self-determination,⁷ and some systemic and driven mainly by concerns for institutional efficiency. I then argue that the former concern ought to be granted more serious consideration by the courts. Courts often subordinate disputants' needs to the desires of the bench (as well as the bar) to clear dockets and reduce the institutional costs of disputes even though empirical studies of court-connected programs suggest that they often fail to meet these institutional goals. There is, however, empirical support for the idea that ADR can advance party self-determination by evoking a sense of procedural justice (i.e., a sense of fair process), which derives from giving parties some control over their dispute.⁸ This self-determination goal of ADR could be further advanced if courts granted disputants more autonomy to exercise their preferences.

Some are More Voluntary Than Others, 26 JUST. SYS. J. 273, 273 (2005) (explaining that "[w]hile early mediation programs relied on voluntary participation, many courts now require litigants to try mediation before proceeding to court," and arguing that this has coercive effects on the litigants).

⁷ Party self-determination refers to disputants' ability to influence the resolution of their disputes, for example, by having the "opportunity to participate actively and directly in the process of resolving their dispute, control the substantive norms guiding their discussion and decision-making, create the options for settlement, and control the final outcome of the dispute resolution process." Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 17-18 (2001).

⁸ Procedural justice concerns the fairness of the process or procedures by which outcomes (i.e., decisions) are made, and may be contrasted with distributive justice, which pertains to the fairness of the outcomes, with respect to the distribution of rights or resources. Lisa B. Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 147.

Courts could implement disputants' preferences in several ways. They could give disputants a voice in the aggregate by determining which procedures and attributes of procedures disputants generally favor, and offering programs that align with those preferences. They could also give disputants individual autonomy by allowing them to shape the procedure that will be used for their particular dispute. Incorporating disputants' preferences into court programs in either of these ways would advance party self-determination. It would also promote procedural justice and provide institutional advantages, both by increasing the likelihood of outcome compliance and increasing participation rates in voluntary ADR programs which, to date, have not achieved the usage rates that many policymakers and dispute resolution specialists initially expected. To the extent that courts seek to promote individual values of procedural justice or other values that rely upon the subjective satisfaction of disputants, it becomes necessary to understand the preferences of disputants in order to design ADR programs that accomplish these goals. It also becomes necessary to understand how courts, as institutions, have the ability to shape their programs to comport with disputants' preferences.

To that end, the second part of the Article presents a systemic analysis. I describe the flexibility that courts generally have to shape their ADR programs, and note that they can choose how much party self-determination to offer. For example, courts that impose mandatory programs which require the use of mediation, arbitration, or some other form of ADR offer relatively little opportunity for the exercise of preferences. In contrast, truly voluntary ADR programs, which allow parties to select and shape the procedure they use, embody a purer exercise of preferences. Given the flexibility that courts enjoy, they should be clear about what values they seek to promote and carefully consider how different program attributes—whether participation in ADR is mandatory or voluntary; whether adjudicative or nonadjudicative procedures are offered; whether a single procedure or a menu of procedures is offered; and how much disputants can shape the procedure they will use—might implicate those values.

The third part of the Article presents a long-overdue synthesis of past research and offers a methodological critique. I demonstrate that many existing empirical studies of disputants' preferences suffer from methodological limitations that restrict their usefulness with respect to program design in modern civil courts. On balance, the initial research, conducted primarily in the 1970s, suggests that disputants favor adjudicative procedures (e.g., arbitration) to nonadjudicative procedures (e.g., mediation). The more recent literature tends to suggest the opposite. What to infer from these conflicting findings remains inconclusive because of the vastly divergent methodologies used across studies. The most promising

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explanation concerns *when* disputants are asked to evaluate procedures—whether it is at the beginning of the dispute resolution process (*ex ante*) or after they have experienced a given procedure (*ex post*). That is, disputants might evaluate different procedures differently depending on when in the dispute resolution trajectory their preferences are assessed.

Insofar as courts could greatly improve their programs by attending more to aggregate disputants' preferences, we need to think more critically about how empirical research can be used to provide clearer information about what those preferences are. To that end, I present an agenda for future research. I propose that researchers study preferences in more nuanced ways than previous research methodology has accomplished. For example, rather than asking research participants to indicate how attractive they find procedures that are labeled, for example, "mediation" or "arbitration," researchers should present them with an extensive list of options corresponding to different features of procedures (e.g., options regarding who will determine the outcome, how the process will be shaped through conversation and the presentation of evidence, and which kinds of substantive rules or norms will be used to guide the outcome)⁹ and ask them to evaluate each option. By offering participants descriptions of procedural feature options rather than descriptions of procedures *in toto*, the

⁹ Unlike in trials where the rules of law pervade, some ADR procedures allow disputants to choose which substantive rules, norms, or standards to use as a basis for resolving their dispute. Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 225 (2004). They might opt to rely on the law, industry standards, norms established by their past dealings, their own sense of fairness, or other factors such as each disputant's relative ability to pay. See, e.g., JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984) (explaining that disputants involved in mediation have the freedom to tailor the outcome to their personal values and norms because the process does not operate under the constraints of legal precedent); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 485 (2007) (explaining that "[i]n theory, every party wishing to include an arbitration agreement may negotiate the precise terms of every aspect of the ensuing arbitration," and that they commonly "incorporate by reference an existing set of publicly available arbitration rules, with perhaps a few modifications or details relevant to their particular dispute"). See also Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 ("The question of whether (and when) people prefer dispute resolution based on public legal norms to dispute resolution based on ad hoc privately negotiated norms unfortunately has not been subjected to much investigation to date. This seems like a grievous lack to me, because the assumption that people prefer treating disputes as problems to be solved, rather than as conflicts to be resolved according to publicly adopted norms, is central to mediation ideology.").

distinguishing characteristics of procedures can be made more psychologically accessible and concrete to the laypeople¹⁰ making assessments. Courts can then use such data to understand which feature options disputants find particularly appealing and tailor their procedures accordingly. Researchers should also borrow the analytical benefits of laboratory experiments by using random assignment to conduct field research. Moreover, they should begin to examine differences between ex ante and ex post preferences, which may differ considerably and may implicate the values that one seeks to promote in designing an ADR program in dramatically different ways.

Ultimately, I argue that it is necessary both to design studies that eliminate the limitations of earlier research, and to understand the difference between ex ante and ex post disputant preferences—analytically (in explaining what values we care about), systemically (in understanding how those values are implicated by different ADR programs), and methodologically (in designing empirical research that will provide courts with relevant and reliable data on contemporary preferences).

Throughout this analysis, I draw on the psychology of dispute resolution from the disputants' perspective. Importantly, I do not suggest that the subjective preferences of disputants should be the *only* factor that courts consider when designing their dispute resolution programs. As a general matter, preferences are psychological factors that should be considered in conjunction with efficiency considerations (i.e., cost and time), along with broader policy concerns. However, although implementing party preferences has significant value in its own right in light of the originating goals of ADR, advancing these subjective preferences might also further efficiency and related institutional goals. At minimum, if disputants tend to find certain procedures especially attractive, then courts can encourage the use of such procedures without facing the dilemma of whether to encourage citizens to use procedures that will probably not satisfy them, irrespective of whether those procedures save time or money.¹¹ In other words, courts ought to be aware of any tradeoffs involved in the procedural choices they invite disputants to make, be they financial, psychological, or of some other genre.¹² Ideally, it would be possible to identify procedures or attributes of procedures that meet the institutional needs of the courts (while also

¹⁰ In this Article, the term "laypeople" refers to people who are not members of the legal profession.

¹¹ See Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOT. J. 367, 368 (1987) (making a similar argument).

¹² *Id.*

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maintaining their statutory and constitutional obligations)¹³ and the needs of those who bring their conflicts to court. Procedures that are institutionally efficient and subjectively palatable to disputants would be the ideal.¹⁴ Before discussing how we can come to better understand disputants' preferences it helps to consider in detail *why* we should care about what disputants want in the first place.

I. ANALYTIC THESIS: WHY SHOULD WE CARE ABOUT DISPUTANT PREFERENCES?

The importance of implementing disputants' preferences in court-connected ADR derives from both historical and pragmatic concerns. A concern for disputants' needs meshes with a core originating goal of the ADR movement—offering parties more self-determination over the resolution of their conflict than is available through the traditional trial process. Moreover, courts that advance party preferences can expect particular pragmatic benefits to accrue. For example, it should increase participation in voluntary ADR programs, and, because it would cultivate a sense of procedural justice, it should also improve voluntary compliance with outcomes. These benefits would in turn support another originating goal of court ADR—greater court efficiency.¹⁵ Each of these reasons is discussed below.

¹³ Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1205, 1262–63 (2000) (arguing that when disputants make individualized requests to the courts, courts should grant only those requests that align with their statutory and constitutional authority).

¹⁴ Naturally, parties to the same dispute might differ in what procedure they prefer. However, empirical studies on this issue, though limited, and surveys of lawyers, suggest that opposing lawyers often favor the same procedure. See Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 581 (2002) (finding that only 24% of lawyers had at least one case, over a 29-month period, in which they and opposing counsel could not agree on which ADR procedure was appropriate). But see Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 426 (2002) (finding that 57.5% of metropolitan area lawyers had at least one civil case, over a two-year period, where they and opposing counsel could not agree on which ADR procedure was appropriate, compared to 41.5% of non-metropolitan lawyers).

¹⁵ For a discussion of efficiency, see *infra* notes 44–47 and accompanying text. Note that efficiency is commonly discussed in terms of reduced court dockets, increased settlement rates, and reduced costs to the courts. Although ADR has generally not been shown to produce such results, it has been shown to improve voluntary compliance with outcomes, which is another way one can measure efficiency. Sylvia Shaz Shweder,

A. The Goals of Court-Connected ADR Programs

In order to appreciate the relative importance that courts should attach to disputants' needs, it helps to understand the duality of purposes typically associated with ADR—one focused on the courts, in terms of greater time and cost efficiency; the other more focused on disputants, largely in terms of party self-determination.¹⁶

These substantially different goals are the products of the multi-dimensional history of modern ADR, which has several strands.¹⁷ One strand, known as the "community justice movement," provides historical support for focusing on the needs of disputants, is and dates back to the community empowerment movement of the late 1960s and early 1970s.¹⁸ Its proponents regarded formal legal institutions, such as the courts, as mechanisms for maintaining the power of the elite, allowing them to exploit the less powerful members of society.¹⁹ Community justice advocates argued

Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements, 20 GEO. J. LEGAL ETHICS 51, 53–54 (2007). Increased outcome compliance can improve the institutional efficiency of the courts because durable outcomes mean fewer trials de novo and less need for court enforcement of agreements resulting from ADR procedures.

¹⁶ See Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics For a New Practice*, 70 TENN. L. REV. 63, 88 (2002) (noting that "the animating impulse behind most of the 'ADR movement' has advocated for client choice in dispute resolution and 'self-determination' in mediation"); EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 4–7 (2006) (discussing party autonomy as the fundamental value of arbitration); Bobbi McAadoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES, 33 n.188 (Donna Stienstra & Susan M. Yates eds., 2004) (noting that although self-determination is most frequently discussed in connection with mediation, it is also associated with ADR more broadly); Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 396 (noting that "[e]mpowerment and ADR go hand-in-hand. Autonomy and ADR go hand-in-hand. ADR promotes such democratic values as self-determination and freedom from interference by the state"); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1784 (2001) (noting that ADR operates "in the sphere of disputant self-determination"); Carrie Menkel-Meadow, *What Will We do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1618 (1997) (elaborating on the duality of goals associated with ADR).

¹⁷ Hensler, *supra* note 2, at 170–71.

¹⁸ *Id.* at 170.

¹⁹ *Id.*

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that in order to take control of the direction of their lives and communities, people needed to create grassroots justice institutions that applied community-based norms and used community members to resolve conflict.²⁰ This idea has been echoed by modern ADR scholars who argue that disputes in some sense belong to disputants, and that they should control how their conflicts are resolved.²¹ A primary goal of ADR, they argue, is to provide greater disputant self-determination relative to trial.²² In this view, disputants' subjective assessments and preferences are key.

As community justice centers were evolving outside the court system, a new movement was evolving within the courts²³—one that was focused on promoting ADR for efficiency-related institutional reasons. After World War II, the "*laissez-faire* judicial system" whereby judges managed "their assignments without much supervision from other judges," and, sometimes relegated case management control to lawyers, was heavily scrutinized.²⁴

²⁰ *Id.* Community justice organizations tended to prefer mediation and other nonadjudicative procedures and reject the use of formal legal norms. *Id.* at 171.

²¹ See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2689–90 (1995).

²² See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 879 (2002) ("Proponents of alternative . . . dispute resolution often argue its chief value is disputant control over the process."); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 726 (1999) (explaining that some "believe that the primary goal is to increase the parties' involvement in, power over, and sense of responsibility for the resolution of their problems. The phrase 'party self-determination' is used in some quarters to capture the spirit of these kinds of purposes"); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6 (1991).

In the 1960s, as part of several other social movements advocating more democratic participation in our various social institutions, a variety of groups urged that dispute resolution should more fully involve the participants in disputes. This would allow individuals to make their own decisions about what should happen to them. Thus, a model of community empowerment, party participation, and access to justice was championed by those concerned with substantive justice and democratic process. This 'movement' resulted in the funding and support of 'neighborhood justice centers' and a variety of more indigenous community dispute resolution centers—many of these justified on the grounds of increased participation and access to justice.

Id.

²³ Hensler, *supra* note 2, at 174.

²⁴ *Id.*

Critics argued that "courts needed to adopt a more business-like approach to using public resources, including judge time."²⁵ Decreasing court budgets, combined with increasing case filings, sparked the "court management" revolution²⁶ which popularized the use of professional "court administrators" to assist judges in managing their calendars.²⁷ Courts began to experiment with different approaches to preparing cases for trial and expediting resolution; the goal for many courts was to save time and money.²⁸ To that end, many courts adopted mandatory non-binding arbitration and mediation in an effort to reduce the time required to resolve civil cases involving smaller amounts in controversy.²⁹ By removing these cases from judicial dockets, they expected to make judges more available for larger cases. Some scholars have suggested that, beneath the surface, these purported institutional goals were simply a socially desirable way of protecting the true motivation for ADR in some courts—judges' desire to control their dockets and choose which cases they would hear.³⁰

²⁵ *Id.*

²⁶ *Id.* (noting that civil cases in the federal courts more than doubled from 1959 to 1976).

²⁷ *Id.*

²⁸ Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 9 (2001) (cataloging the values associated with court-connected ADR programs and concluding that "efficiency and reducing cost and delay appear to be the values that account for much of the interest of the courts"); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 162 ("That press of business—the docket—is typically proffered as the central variable in the story of judicial promotion of alternatives [to litigation].").

²⁹ For example, the Civil Justice Reform Act of 1990 urged courts to adopt ADR as a means to reducing costs and time to disposition of civil cases in the federal courts. *See generally* JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

³⁰ Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 892–95 (1991) (arguing that "[s]upport for ADR as a means to control court dockets pervades the federal judiciary"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–80 (1982) (arguing that whereas judges used to have a disinterested approach to the cases they heard, the newer "case management" paradigm makes it more likely that judges take an active role in deciding which cases to hear). Empirical research has found that since ADR use began to increase in the mid 1980s, the type of cases heard in federal courts has changed from predominantly torts to predominantly civil rights. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 485 (2004). Because this kind of analysis between general ADR usage and types of cases

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In establishing their programs, many contemporary courts echo these two core originating values of ADR. The preambles of statutes and local court rules that establish some court programs suggest that their primary goals are to improve court efficiency or save money. The local rules of New Jersey, for example, state under the section entitled "Purpose, Goals" that the program is "intended to enhance the...quality and efficacy" of the judicial process.³¹ Similarly, the Utah ADR Act states that its

purpose is . . . to promote the efficient and effective operation of the courts of this state by authorizing and encouraging the use of alternative methods of dispute resolution to secure the just, speedy, and inexpensive determination of civil actions filed in the courts of this state . . . ADR procedures will reduce the need for judicial resources and the time and expense of the parties.³²

By contrast, other programs recognize the importance of disputants' subjective perceptions in addition to more efficiency-related goals. For example, Colorado's Dispute Resolution Act provides for mediation not only "for the prompt resolution of disputes" but also to allow "each participant, on a voluntary basis, to define and articulate the participant's particular problem for the possible resolution of such dispute."³³ Hawaii's legislature created an ADR center in order to "help reduce public and private costs of litigation and increase satisfaction with the justice system."³⁴ The statute establishing ADR in West Virginia expresses a similar set of concerns. It not only mentions a "growing concern" about "limits on access to justice arising from court case backlog, delays and costs," but it also acknowledges the importance of "perceptions regarding the appropriateness and effectiveness of court procedures" and explains that "the continuation and growth of these

heard by courts is correlative, it should be interpreted as suggestive, but not dispositive, of possible underlying causative effects.

³¹ N.J. CT. R. 1:40-1, *available at* <http://www.judiciary.state.nj.us/rules/r1-40.htm> (last visited Apr. 1, 2008).

³² UTAH CODE ANN. § 78-31b-3 (2007). Some state constitutions also uphold institutional values. *See, e.g.,* GA. CODE ANN. STATE COURT RULES, ALTERNATIVE DISPUTE RESOLUTION RULES Intro. (West 2007) (stating that the "Georgia Constitution of 1983 mandates that the judicial branch of government provide 'speedy, efficient, and inexpensive resolution of disputes and prosecutions.' As part of a continuing effort to carry out this constitutional mandate the Supreme Court of Georgia established a Commission on Alternative Dispute Resolution").

³³ COLO. REV. STAT. § 13-22-305 (2007).

³⁴ HAW. REV. STAT. § 613-2 (2006).

procedures is important in enhancing the quality of life for the citizens of this state."³⁵

Particularly interesting is how the two underpinning motivations appear to be associated with different probabilities of program success, where "success" is defined in terms of how well these underlying primary goals are met. Specifically, it appears as though programs aimed at promoting the subjective satisfaction of disputants are more likely to achieve their goals relative to programs that attempt to promote more institutionally driven aims related to efficiency or cost-saving.³⁶ Many courts expect that the net effect of instituting an ADR program will be greater efficiency in terms of a reduction in the average costs and time required to process civil lawsuits. As is often true, however, what sounds good in theory seems not to have been borne out empirically. Studies of court ADR programs have generally failed to find that they save significant amounts of either time or money.³⁷

³⁵ W. VA. CODE § 55-15-1 (2007). *See also* IDAHO CIV. RULE 16.5(a)(1), available at <http://www.id.uscourts.gov/docs/ADR.pdf> (last visited Nov. 15, 2007) (stating an intent "to improve parties' access to the dispute resolution process that best serves their needs and fits their circumstances"); Local Rules of the Super. Ct. of Cal., Alameda County § 6.1, available at www.alameda.courts.ca.gov/courts/rules/chapter6.pdf (last visited July 16, 2007) (stating both efficiency and party benefits as goals); Welsh, *supra* note 7, at 3–4 (analyzing Florida and Minnesota state mediation laws that attempt to safeguard party self-determination).

³⁶ Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1593–94 (1995).

Interestingly, empirical research on the outcomes of court-annexed ADR procedures suggests a rather different picture of the costs and benefits of these procedures than either ADR proponents or opponents have anticipated. The efficiency gains . . . appear mixed . . . [b]ut the gains in quality of process, at least as assessed by the disputants, appear significant . . . In sum, while the main impetus for ADR in the court context appears to be a desire for efficiency—that is, reductions in cost and delay—the parties' reactions to ADR speak more to the objectives of gaining control over the litigation process that have been associated with the enthusiasm for ADR expressed by the community justice movement and the corporate community.

Id.

³⁷ *See* E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* v (1990); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 119–20 (pointing out that many studies have examined the effect of court-connected ADR programs on judicial case processing and indicating that they usually have failed to find that ADR affects court efficiency); Dayton, *supra* note 30, at 896, 915–16 (reviewing research comparing "ADR and non-ADR districts with respect to a number of important factors that serve as a measure of

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whether ADR has been successful as a court management tool," and concluding that the "comparisons conclusively show that ADR has not resulted in speedier resolution of federal civil cases, has not reduced backlogs, and has not affected the incidence of civil trials"); *id.* at 894–95 (discussing the few controlled experiments concerning ADR and their findings that ADR does not appear to significantly increase disposition rates or decrease court costs); Susan K. Gauvey, *ADR's Integration in the Federal Court System*, Mar./Apr. 2001 MD. B.J. 36, 43 (reviewing empirical research and noting that "researchers and commentators in ADR have been reluctant to declare victory, finding little hard evidence to date that ADR has solved the problems of cost and delay, which spawned interest in ADR"). Michael Heise reported the results of an empirical study of a subset of one year of civil cases from 45 of the nation's 75 most populous counties and concluded that the:

Results . . . suggest that a case's referral to ADR increased the case's disposition time in a statistically significant manner. Paradoxically, among the principal rationales for ADR programs is a desire to reduce the costs and delays associated with the formal legal system, particularly trials. However, blunting any surprise with this finding is that it comports with prior empirical research on the effects of ADR policies on civil trial disposition time, notwithstanding the goals sought through ADR or its proponents' wishes.

Michael Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 846 (2000). See also Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 74–76 (describing RAND study which found no "significant differences in time to disposition or litigation costs between cases that were referred" to ADR and ones that were not and noting policymakers' surprise and negative reactions to these results); Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 408 (noting that "[t]he primary objective of court-ordered arbitration is to divert cases from trial—the key to saving time and money for courts and private litigants alike," but concluding, on the basis of a review of empirical studies, that "most court-ordered arbitration programs do not significantly reduce the number or the rate of trials"); James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 38 (1997) (reporting an empirical study and noting that the absence of a finding that ADR influences time or cost is "consistent with the results of prior empirical research on court-related ADR"); Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 230, 242 (1991) (citing studies of arbitration and noting that "arbitration is likely to divert many more cases from settlement than from trial. The net affect can actually result in an increase in delay and congestion in the courts"); Craig A. McEwen, *An Evaluation of the ADR Pilot Project*, 7 ME. B.J. 310, 310–11 (1992) (describing a study in which 15% of the total civil docket entered ADR, and finding no discernible impact on the overall court docket); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 877–82 (1997) (noting that "[ADR] does not produce aggregate economic savings for the courts" and that "mediation and arbitration do not generally save disputants time and money"). But see Mary Ann P. Koch & Carol R. Lowery, *Evaluation of Mediation as an Alternative to Divorce Litigation*, 15 PROF. PSYCHOL. RES. & PRAC. 109, 112–13 (1984) (showing that

Although it has been shown that the trial rate has diminished since ADR has become more widespread,³⁸ the empirical evidence to-date offers little support for the idea that ADR reduces docket overload or promotes court efficiency.³⁹ That is, courts offering ADR are as busy as ever with trials, although they may now simply be focusing their time on a different subset of cases.⁴⁰ There is little support for the view that court-connected ADR has reduced the average time to disposition for civil lawsuits, or the average

mediation costs about 10% less than conventional litigation); Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say about Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 394–95 (2007) (finding that judges in Minnesota reported that ADR contributed to a reduction in judicial workload); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL'Y 351, 356–57 (2003) (noting that data suggest that ADR saves court time and some judges report a 50% reduction in their domestic docket after mandatory mediation programs were implemented); ADMINISTRATIVE OFFICE OF THE COURTS, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 27–31, 66 (2004), <http://www.courtinfo.ca.gov/reference/documents/empprept.pdf> (last visited Nov. 15, 2007) (finding that use of ADR was associated with a reduction in time to disposition and expense to litigants and reporting that "[i]n San Diego, the total potential time saving from the pilot program was estimated to be 521 trial days per year (with an estimated monetary value of \$1.6 million); in Los Angeles, the potential saving was estimated to be 670 trial days per year (with an estimated monetary value of approximately \$2 million)"); (last visited Nov. 15, 2007). Court-connected arbitration also is not typically economically advantageous to disputants because lawyers tend to charge them comparably for arbitration or trial. Roselle L. Wissler & Bob Dauber, *Court-Related Arbitration Access, if Not Efficiency*, DISP. RESOL. MAG. 35 (2007). The disputants are, however, spared the cost (due to court fees) and time (due to back-log) associated with trial. Hensler, *supra* note 2, at 178. Some scholars have argued that ADR can actually increase costs to disputants because ADR sometimes imposes an additional procedure on them, triggering higher attorney fees. McAdoo, *supra*, at 382. This scenario is most likely to arise when court-connected ADR fails to produce settlement, and the parties subsequently proceed to trial. See MacCoun, *supra*, at 235; Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 92 (2007) (noting that "some programs require parties to pay for court-annexed ADR either directly or as a potential sanction for rejoining the queue to trial. It is ironic that parties who opted to litigate rather than to pay for private dispute resolution may be required to pay in any event before being allowed to use the public 'free' dispute resolution traditionally offered by courts. For cases that are unresolved by court-annexed ADR and continue to trial, parties incur additional costs").

³⁸ Galanter, *supra* note 3, at 1 (noting that the trial rate in the federal courts has dropped despite a fivefold increase in the number of case filings).

³⁹ See *infra* notes 43–48 for a review of the relevant literature.

⁴⁰ Galanter, *supra* note 3, at 2 (suggesting that the types of cases heard in federal courts has changed since the 1980s, switching from predominantly torts to primarily civil rights).

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public (or private) expense to litigate cases. Instead, results from empirical studies have tended to undercut some core institutional goals associated with the implementation of court-connected ADR programs.

By contrast, the more psychological disputant-focused goals appear to be more readily achievable. Research has rather consistently shown that ADR subjectively appeals to ordinary citizens. They regard ADR procedures as fair and value them for providing an opportunity for voice and process control which promote self-determination.⁴¹ Such findings are consistent with a long line of psychological studies in the procedural justice paradigm, which explores the criteria people use to assess legal (and other) procedures.⁴² In fact, procedural justice or process fairness considerations have been found to dominate the evaluations that citizens make of the courts.⁴³ Thus, ADR seems particularly well-suited to advancing disputant-related values.

⁴¹ Welsh, *supra* note 7, at 19–21; William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW. & SOC'Y REV. 661, 698–99 (1985) (reporting empirical research suggesting that procedures operating without the formalities of the rules of evidence are able to provide citizens with expressive satisfaction which they are often denied in court). Similarly, authors of a study evaluating the fairness of the New Jersey special education mediation system state:

[P]roponents maintain that mediation can reduce the time, expense, and emotional cost of special education disputes and that mediation can reduce the impact of resource disparities to effect fairer outcomes. Our findings do not support such optimistic views of the benefits of mediation. The traditional focus of research regarding mediation concentrates on the requisites for short-term mediation success: reaching agreement, serving disputant goals, and producing immediate disputant satisfaction. More recent research suggests that parties' viewing the process as fair and feeling they had an opportunity to voice their concerns are more important to long-term success.

Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 60 (1997) (emphasis omitted).

⁴² For a definition of procedural justice, see *supra* note 8.

⁴³ See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 233 (2001) (reporting four large-scale studies of laypeople's perceptions of courts and legal authorities, and concluding that perceptions were not primarily associated with outcomes or outcome-related judgments like cost or speed, but with how fairly they feel such entities treat people); Roger K. Warren, *Public Trust and Procedural Justice*, CT. REV. FALL 2000, at 12, 13 (commenting on a line of empirical research and concluding that "[a]lthough . . . the public expresses great dissatisfaction with the high cost of access to the courts and the slow pace of litigation, it is not primarily those factors, but rather the fairness of court processes, that is associated with

As Judge Wayne Brazil has argued, the consequences of different court motivations can be dramatic.⁴⁴ Courts that focus on institutional efficiency often evaluate their programs primarily by their impact on settlement rates.⁴⁵ When they assess the value of their programs in this manner, they pressure the neutrals in their programs to "elevate ends over means; that is, to care more, perhaps appreciably more, about 'getting a deal' than about how they conduct themselves" in the process.⁴⁶ These courts often promote settlement at the expense of the procedural justice that their programs might otherwise provide—a consequence considerably at odds with the primary needs of the parties, whose primary interests tend to be unrelated to efficiency or cost savings.⁴⁷ Thus, the kind of program that most favors the bench is also likely to be the type which has little long-term appeal to the disputants.

varying levels of public trust" in the courts). *But see* DAVID B. ROTTMAN ET AL., NATIONAL CENTER FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 53 (2003), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf (last visited Nov. 15, 2007) (conducting study of random sample of adults, and an additional sample with court experience during the preceding 12 months, and finding that efficiency was generally no more important than fair treatment, except for those who had experienced the courts directly. For this sample, ratings of perceived fair treatment explained more of the variability in evaluations of the courts than did efficiency ratings).

⁴⁴ Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 266–68 (2006) (contrasting disputant-oriented and docket-oriented ADR programs in terms of their motivations and values).

⁴⁵ *Id.* at 266.

⁴⁶ *Id.*

⁴⁷ Issues of delay and the cost of litigation, which can be avoided by early settlement, have been found to have little impact on party satisfaction with case outcomes. E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEW OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES v (1989). A recent National Center for State Court study also supports this view. *See* ROTTMAN ET AL., *supra* note 43, at 53–54 (reporting a study of a random sample of 954 adults and an additional 570 adults with court experience during the preceding twelve months, and finding that efficiency was no more important than fair treatment, but that after experiencing the court system directly, ratings of perceived fair treatment explained more of their evaluations of the courts than did efficiency ratings). *See also* E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 984 (1990) ("[T]hose who argue for procedural innovations often assert that the reduced cost and delay they hope to achieve will produce greater litigant satisfaction and greater feelings of fairness. Our findings show that reduced cost and delay, however desirable in their own right, cannot be counted on.").

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The converse, however, is unlikely to be true—that is, attention to the subjective satisfaction of disputants is unlikely to frustrate institutional aims. It is probably not a coincidence that some programs that are widely regarded as ones that respect disputants' autonomy also happen to be ones that have been shown empirically to be time- and cost-efficient.⁴⁸ A good example is the program offered by the Superior Court of San Mateo County, California, a court well-known in the ADR community for offering disputants choice. It is a role model in this regard for several reasons. First, it is a voluntary program. Second, it offers "multi-option" ADR, which provides parties with several procedures from which they can choose. Third, parties in its civil program can also select their own neutral.⁴⁹ For example, disputants opting for mediation can choose between mediators who have a background in law, and ones that have a different orientation for resolving conflict (e.g., counseling). Fourth, parties have wide latitude in determining at what point in the dispute resolution trajectory ADR should be used. Fifth, the program offers pro bono and modest-means assistance to parties who are indigent or need help with ADR fees, thereby giving them the option to use ADR for their dispute. Sixth, it collects evaluations of the program from the parties, in addition to the lawyers and neutrals. Altogether, such program features signal strong respect for disputants' preferences. A study of this program found that it also succeeded in reducing the amount of court time in 93% of cases.⁵⁰

⁴⁸ Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 843 (2004) (arguing that where there has been evidence of cost and time savings in some court-connected ADR programs, "it is evident that much depends on the shape and structure of such programs"). See also *infra* notes 105–09 and accompanying text. See generally Floyd Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148, 159 (1987) (describing research suggesting that "decisions perceived as unfair are economically inefficient because of the increased resistance" to them.).

⁴⁹ Interview with Sheila Purcell, Program Director, Multi-Option ADR Project, Superior Court of California, County of San Mateo (Jan. 8, 2007) (reporting that parties in the court's civil program can select their own neutrals either from the court's closely screened list, which includes attorneys, non-attorneys, and retired judges, or from some other source, provided it is someone who is mutually agreed upon and stipulated to by the parties).

⁵⁰ ROSARIO FLAGG & ADR STAFF, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO, MULTI-OPTION ADR PROJECT EVALUATION REPORT JULY 2002–JULY 2003 16–17 (2005), available at <http://www.sanmateocourt.org/adr/evaluations/1--Evaluation-Introduction.pdf> (last visited Nov. 15, 2007) (stating that based on attorney reports, in 2002–2003, ADR reduced the amount of court time in 93% of cases, and disputants' costs were reduced as a result of ADR in 83% of cases). Similarly, the Early Neutral Evaluation (ENE) program in the Northern District of California, another court known for promoting party autonomy, has been associated with marked financial benefits for the

Thus, the program succeeded not only in promoting disputant self-determination, but also in meeting institution-focused goals. The reasons why implementing party preferences can positively affect both disputant- and institution-focused values is the topic to which we now turn.

B. Expected Benefits of Attending More to Disputant Preferences

Implementing disputants' preferences in court programs has several important expected benefits. First, it can enhance party self-determination, a goal of ADR that distinguishes it from formal adjudication. Second, it can promote procedural justice. Courts that mandatorily impose ADR, for example, might significantly increase procedural justice by ensuring that the procedures they offer comport with aggregate lay preferences (as suggested by empirical research), or by facilitating the individualized shaping of procedures by disputants, case-by-case. The positive institutional consequences of high levels of procedural justice documented in other domains are likely to emerge in the court-connected context—for example, improved voluntary compliance with outcomes. Third, at a time when many researchers and scholars are lamenting the low usage rates of voluntary court-connected ADR, greater attention to what disputants want from ADR might increase participation in such programs, which would also help to advance the institutional goals of the courts. Each of these expected benefits of implementing disputants' preferences is explored in detail below.⁵¹

1. Improved Party Self-Determination

Party self-determination is a cornerstone principle of ADR.⁵² As Caroline Harris Crowne has argued, the paradigms of adjudication and ADR are *supposed* to be distinctly different.⁵³ She labels these two paradigms of

parties and their lawyers. Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1487 (1994). In an evaluation of this program, one third of the attorneys surveyed reported decreased costs. *Id.* at 1500. The median savings by attorneys was \$10,000 and \$20,000 by the parties. *Id.* For a description of ENE, see *infra* note 68.

⁵¹ The goal of this Article is not to argue whether increased use of court-connected ADR is normatively good or bad. Rather, I proceed from the assumption that courts want to promote the use and effectiveness of their ADR program and analyze how they might achieve these goals by attending more to disputant preferences, and the empirical research on such preferences.

⁵² See *supra* notes 16–22 and accompanying text.

⁵³ Crowne, *supra* note 16, at 1769.

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dispute resolution the "public-service model" and the "customer-service model."⁵⁴ The procedural characteristics of adjudication and ADR demonstrate that they are designed to serve the interests of two different constituencies: the public and the customer, respectively.⁵⁵ The hallmarks of adjudication, uniformity and transparency, allow for the imposition of legal standards and appellate review.⁵⁶ These characteristics in turn make judges responsive to public interests, by limiting individual discretion and requiring compliance with common norms and public laws.⁵⁷ By contrast, the trademarks of ADR are flexibility and privacy.⁵⁸ These characteristics should make neutrals responsive primarily to the disputants—the actual "customers" of their services.⁵⁹

As discussed above, a core originating goal of the ADR movement was to empower individuals and provide them with greater self-determination over the resolution of their legal conflicts.⁶⁰ The social dynamics of program design (wherein disputants' perspectives are often muted) and decisionmaking with respect to the use of ADR for a particular case (where courts often override disputants' desires by directing subsets of cases to a particular procedure) have, however, eclipsed this intended focus of ADR.⁶¹

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1777.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Crowne, *supra* note 16, at 1769.

⁶⁰ See *supra* notes 16–22 and accompanying text.

⁶¹ Lela P. Love & James B. Boskey, *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1, 1 (1997) (arguing that "in the field of ADR, where the expectation was that an increased acceptance of mediation by the courts and the legal profession would simply decrease the adversarial nature of legal disputes, it appears that it may have also unintentionally increased the legalistic and adversarial nature of the mediation process" because of the increased involvement of legal professionals and institutions); Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161, 172–73 (2005) ("[R]esearchers have found that attorneys dominate court schemes . . . the self-determination of the parties is being, [sic] overridden by the use of evaluative mediation, which lawyers are said to prefer."). Nancy Welsh argues that:

even as most mediators and many courts continue to name party self-determination as the 'fundamental principle' underlying court-connected mediation, the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms

The relative lack of emphasis on disputants' needs meshes with the ongoing debate over the proper role of party self-determination in dispute resolution. In the context of this debate, Lisa Bingham has argued that we should refine our notions of self-determination: "in addition to [considering] self-determination over process and outcome in the individual case, we need to start examining who has control over design of the dispute system as a whole."⁶² As she notes, a number of leading scholars have written about what self-determination might mean at the case level, especially in regards to mediation.⁶³ For example, disputants might exercise self-determination at the case level by deciding for themselves which type of mediation to use (evaluative, facilitative, or transformative), and how much they will communicate with the other party either directly or indirectly through their lawyers.⁶⁴ Importantly, however, relatively little scholarly discussion has

and traditional practices of lawyers and judges, as well as the courts' strong orientation to efficiency and closure of cases through settlement.

Welsh, *supra* note 7, at 5.

⁶² Bingham, *supra* note 37, at 102.

⁶³ *Id.* at 104–05 (reviewing the relevant literature); Welsh, *supra* note 7, at 6 (emphasizing the need to "clarify the meaning of 'self-determination' and to develop effective mechanisms to protect it," because of the "institutionalization of court-connected mediation"); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 34 (1996) (arguing that "evidence shows clearly that disputants place great value on the degree and quality of participation" in mediation and that mediators should place less emphasis on evaluation and more on empowering the disputants).

⁶⁴ In fact, the evaluative-facilitative-transformative mediation debate arguably revolves around the issue of how much self-determination parties should have in terms of both process and outcome. See Bingham, *supra* note 37, at 102. In essence, this debate concerns how a mediator should mediate. In evaluative mediation, mediators share their own perceptions of how the case would be evaluated if it were presented at trial, in order to help the parties understand the advantages and disadvantages of proceeding to trial rather than settling the case. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 26 (1996). They may also propose and defend outcome alternatives. *Id.* By contrast, facilitative mediators facilitate a negotiation between the parties without presenting their own views on the case or generating possible outcome alternatives. *Id.* at 28. Transformative mediation differs significantly from these two models. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (explaining the transformative approach to mediation). Instead of seeking resolution of the immediate problem, transformative mediators aim for the empowerment and mutual recognition of the parties more broadly, thereby attempting to transform them as

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addressed self-determination at the program design level, wherein disputants might have a voice as to which procedures a court offers in the first place.⁶⁵

Currently, court-connected programs typically provide disputants little opportunity to have a voice in determining which procedures are offered (program-design level) or to shape the procedure that will be used for their dispute (case-level). In mandatory programs, the courts effectively make program design choices for the parties.⁶⁶ Courts that require ADR and then specify a neutral, a list of neutrals, or a single standard of practice, also essentially allocate major system design choices to themselves.⁶⁷ Similarly, party control is greatly limited when courts offer non-binding arbitration, Early Neutral Evaluation ("ENE"),⁶⁸ or summary jury trials,⁶⁹ and prescribe

individuals. *Id.* It is not the primary mode of mediation in any court-connected program. *Id.*

⁶⁵ Bingham, *supra* note 37, at 104. Bingham has argued that "[s]ince the leading professional organizations approved Model Ethical Standards at a time when courts had already implemented mandatory mediation programs, it is reasonable to conclude that the drafters had in mind self-determination as to outcome at the individual case level." *Id.* See also WILLIAM URY, JEANNE BRETT, & STEPHEN GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO HANDLE CONFLICT* (1988); Corinne Bendersky, *Culture: The Missing Link in Dispute Systems Design*, 14 NEGOT. J. 307 (1998) (advocating the tailoring of corporate dispute resolution systems to the company's culture and examining similarities between explicit policy-driven dispute resolution and implicit methods of dispute resolution); see generally Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207 (1996) (advocating the use of "interest-based" design in which those who develop programs facilitate design by working with all of the stakeholders). Early work by Ury, Brett, and Goldberg, who studied collective bargaining grievance procedures as a model of a dispute system, suggests obtaining input from the potential users of the system, for example, through focus groups. WILLIAM URY, JEANNE BRETT, & STEPHEN GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO HANDLE CONFLICT* 69 (1988); see also Gina Viola Brown, *A Community of Court ADR Programs: How Court Based ADR Programs Help Each Other Survive and Thrive*, 26 JUST. SYS. J. 327, 329 (2005) (arguing that the lack of public awareness is a continued obstacle for the use of ADR and that if disputants are not knowledgeable about ADR, their access depends on their lawyers, many of whom are unaware of or misunderstand it).

⁶⁶ In some jurisdictions, however, courts are authorized by the legislature to mandate a certain procedure. Bingham, *supra* note 37, at 104.

⁶⁷ *Id.* at 123 (arguing that when mediation is forced on the parties, self-determination in system design is generally lower than when the parties voluntarily elect to mediate their case on an ad hoc basis).

⁶⁸ Early Neutral Evaluation ("ENE") is a non-binding process by which the parties make presentations early in the litigation process to a neutral evaluator—generally a private lawyer with expertise in the subject matter of the dispute. RISKIN ET AL., *supra* note 1, at 17 (2005). The neutral then identifies the strengths and weaknesses of each

strict rules for how these should be conducted, or place flexibility in the hands of the neutrals, without obligating them to solicit input from the parties.⁷⁰

To further analyze how programs might promote disputant self-determination, it helps to conceptualize the construct as existing on a continuum. In the court-connected context, the factor that typically varies across programs with respect to disputant self-determination is *process*, rather than outcome. Outcomes produced by court-connected ADR are typically under the control of disputants by default, because they are usually non-binding (a disappointed disputant can typically exercise self-determination by requesting a trial de novo).⁷¹ Thus, the variable at issue is

party's case, and offers a non-binding assessment of the merits of the case. *Id.* Cases not settled through ENE proceed to trial. Victoria E. Briant & William N. Hebert, *Civil Practice and Litigation Techniques in Federal and State Courts Developing Legal Issues and Effective Practice Techniques in Mediation and Arbitration*, in AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 588 (1999).

⁶⁹ A summary jury trial (SJT) is an abbreviated mock jury trial proceeding. RISKIN ET AL., *supra* note 1, at 17 (2005). These proceedings typically take place in a courthouse, and use individuals who were called for jury duty but not selected for jury participation as mock jurors. Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 470–72 (2003). Often, these mock jurors are not informed until after the termination of the proceeding that their verdict was merely for settlement purposes, and is therefore nonbinding. *See generally* Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) (describing summary jury trial procedures); Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 470–75 (2003) (describing and critiquing summary trial procedures).

⁷⁰ Bingham, *supra* note 37, at 119–20.

⁷¹ *See* ELIZABETH ROLPH & DEBORAH HENSLER, COURT-ORDERED ARBITRATION: THE CALIFORNIA EXPERIENCE 2 (1984) (explaining that "[t]o avoid the possibility of abridging constitutional or statutory protections granting litigants the right to a jury trial, parties may always appeal an arbitrator's award by requesting and receiving a trial de novo back on the traditional adjudicative track"). Requesting a trial de novo is often contingent upon payment of a penalty fee, which:

[T]ypically arises in one of three ways: (1) the appellant pays a filing fee for his appeal; (2) the appellant pays the arbitrator's cost of hearing the matter originally; or (3) the appellant pays his adversary's court costs. Many courts require penalties to be imposed on the appellant if he fails to improve his position at trial, while other courts impose them whenever an appeal is filed.

James C. Thornton, *Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation*, 77 KY. L.J. 881, 895 (1989). *See, e.g.*, JENNIFER E. SHACK & DANIELLE LOEVY, CENTER FOR ANALYSIS OF ADR SYSTEMS (CAADRS), SUMMARY OF COURT-

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control over process. At one end of the spectrum is no self-determination at all—courts impose a single, specific mandatory procedure on the parties, and they have no control over the features (i.e., format or style) of that procedure.⁷² An intermediate level of self-determination is exemplified by mandatory programs in which parties are offered a menu of procedures from which to choose or where, if a particular procedure is mandated, they are given considerable flexibility in shaping its features.⁷³ Full self-determination is advanced in purely voluntary programs which offer several procedures and also grant the disputants some autonomy to shape the features of the procedure they choose. Some courts already practice this type of case-level self-determination. For example, Alaska's state courts offer a choice between facilitative and evaluative mediation;⁷⁴ Virginia's state courts allow disputants to choose between facilitative and evaluative mediation provided that the evaluative aspect does not interfere with disputant autonomy.⁷⁵ Self-determination expands even further when disputants have the power to agree on the timing and scope of the procedure, the identity of the neutral, and the substantive rules or norms that will be used to resolve the conflict.⁷⁶

How a given program can increase disputant self-determination depends on where it already sits on the continuum. Mandatory programs can convert to voluntary ones, or transform into a "compromise" between these options in the form of an opt-out program.⁷⁷ Because opt-out programs generally have

CONNECTED ADR IN ILLINOIS (2004), *available at* http://www.caadsr.org/studies/adr_summary.htm.

⁷² Bingham, *supra* note 37, at 123 (arguing that when mediation is forced on the parties, self-determination in system design is lower than when the parties voluntarily elect to mediate their case on an ad hoc basis).

⁷³ Carrie Menkel-Meadow has signaled the importance of party autonomy as follows: "I have come to the view that almost any dispute would benefit from some form of ADR exposure, and thus, I have moved from a position of advocating only voluntary ADR to supporting presumptively mandatory ADR—with party choice about which proce[dure] should be used." Menkel-Meadow, *supra* note 16, at 1618.

⁷⁴ Mediation, Alternative Dispute Resolution and the Alaska Court System § B(5) (1999), <http://www.ajc.state.ak.us/reports/medguide99.pdf>. It is likely that where the disputants have high self-determination in dispute system design and can control the choice of mediation model, they will be equally satisfied with whatever model they choose. Control over the choice is key. This might explain the tendency for most assessments of mediation in a variety of contexts and programs to produce similarly high participant satisfaction rates.

⁷⁵ VA. R. PROF. CONDUCT § 2.11(d) (2005).

⁷⁶ Bingham, *supra* note 37, at 109 (making a similar argument).

⁷⁷ Voluntary programs tend to produce settlement rates as high as mandatory ones, but offer the added advantage of increased party self-determination and control. *See, e.g.,*

participation rates as high as mandatory ones,⁷⁸ they do not compromise trial-rate reduction and similar institutional goals of court-connected ADR. If research ultimately reveals that disputants in the aggregate favor mediation for general civil disputes involving friends, family and acquaintances, but arbitration for the same kinds of cases involving strangers, courts could rely on such findings to justify offering an abbreviated version of a multi-door courthouse in which they offer parties the choice from among these procedures.⁷⁹ This kind of multi-option program would greatly promote disputant self-determination.⁸⁰

As Bingham points out, "The jury is still out on what dispute system design is best, fairest, wisest and most effective in a court setting. Courts could duck this question and essentially let the disputants answer it."⁸¹ Courts could become a forum for disputants to shape their own system by giving them choice over the type of procedure, including whether to use mediation, non-binding arbitration, ENE, or summary jury trial, and which model of practice to use, for example, evaluative, facilitative or transformative mediation.⁸² Insofar as lawyers strongly influence client decisionmaking with respect to ADR,⁸³ it becomes important that legislatures and courts protect party autonomy at the front-end by mandating or suggesting procedures that align with aggregate disputant preferences. They should then build flexibility into the governing rules so that the parties can

Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259 (1996) (finding comparable settlement rates for voluntary and mandatory mediation).

⁷⁸ Bingham, *supra* note 37, at 119 (noting that opt-out programs have been found to encourage the use of ADR as effectively as mandatory programs).

⁷⁹ The "multi-door" courthouse idea originates from Frank Sander's 1976 famous speech entitled "Varieties of Dispute Processing" that encouraged courts to take a role in matching cases with appropriate dispute resolution procedures. Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1, 12 (1985). As one researcher has noted: "In the mid-1980s the American Bar Association established experimental multidoor courthouses in Houston, Tulsa and the District of Columbia. Those in the District of Columbia and Houston have been made permanent, and multidoor courthouses have now been established in other jurisdictions." Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design*, 10 ALTERNATIVES TO HIGH COST LITIG. 151, 152 (1992).

⁸⁰ *Id.*

⁸¹ Bingham, *supra* note 37, at 125-26.

⁸² Crowne, *supra* note 16, at 1788-89.

⁸³ Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 570 (1997).

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exercise some design preferences on a case-by-case basis. In sum, by giving party preferences significant weight, either at the program design level, at the case-level, or both, courts can promote disputant self-determination, which not only is a core originating goal of ADR but an attribute which supports the existence of the ADR enterprise as distinct from formal adjudication.

2. Increased Procedural Justice and Compliance with Dispute Resolution Outcomes

As psychologist Tom Tyler has noted, "[s]ince people typically have had little experience with various dispute resolution procedures, it might seem that they would lack clear preferences, since they have no standard against which to judge the fairness of the various procedures they might encounter."⁸⁴ While most laypeople may lack experience with formal dispute resolution, research has demonstrated that they are not reluctant to express relative preferences among procedures, or to "rate" the features of procedures.⁸⁵ In fact, laypeople seem to have very clear and strongly held views about the fairness of various procedures, however they derive those preferences.⁸⁶ Importantly, these views have clear consequences for laypeople's reactions to dispute resolution efforts, their evaluations of third-party neutrals and, more broadly, the legal system as a whole.⁸⁷ The vast literature that examines how laypeople such as disputants derive psychological satisfaction from procedures independent of the outcomes of such procedures falls under the rubric of procedural justice research.

Procedural justice studies of lay preferences for dispute resolution procedures consistently find that perceptions of fairness moderate those preferences. That is, people generally formulate preferences for procedures by first determining which procedure seems most fair and then expressing a preference for that procedure.⁸⁸ Research has also clearly demonstrated, somewhat counter-intuitively, that assessments of dispute resolution processes and outcomes are not entirely dependent upon each other.⁸⁹

⁸⁴ Tyler, *supra* note 11, at 368.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.* at 369 (synthesizing the criteria typically found to contribute to judgments about the fairness of legal procedures); see also *infra* notes 175–94 and accompanying text.

⁸⁹ Specifically, researchers have found that evaluations of process and outcomes comprise two distinct factors in principal components factor analysis. Hensler, *supra* note

Specifically, perceptions of how fair a procedure is tend to depend as much, if not more, on process characteristics than on whether particular disputants "won" their case or were otherwise favored by the outcome.⁹⁰ Naturally, people may feel most satisfied when they believe the process was fair *and* that it provided them with a favorable outcome.⁹¹ But research has shown

9, at 88 n.24 (reviewing the relevant research and observing how this finding surprised legal professionals). *See also* E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (reporting research finding that fairness judgments were enhanced when participants had an opportunity to voice their opinions before a decision was announced even when there was no chance of influencing that decision); Tom R. Tyler, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (reporting research suggesting "that voice increases satisfaction, irrespective of whether it is linked to decision control. In other words, voice without decision control does indeed heighten judgments of procedural justice. In fact, it does so as much as when voice is linked to actual decision control").

⁹⁰ For example, Robert A. Baruch Bush has argued:

There is thus a substantial body of research that answers our question about what parties value in dispute resolution processes. The most remarkable thing is what the answer is not. Despite what we might have thought, parties do not place the most value on the fact that a process provides expediency, efficiency or finality of resolution. Not even the likelihood of a favorable substantive outcome is considered most important. Rather, an equally, if not even more highly, valued feature is "procedural justice or fairness," which in practice means the greatest possible opportunity for participation in determining outcome (as opposed to assurance of a favorable outcome), and for self-expression and communication.

Bush, *supra* note 63, at 20–21 (emphasis omitted). *See also* DAVID B. ROTTMAN, NAT'L CTR. FOR STATE CTS., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 25 (2005) (reporting on a study of over 2400 adults from California and finding that how fair they regarded court outcomes was "secondary to procedural fairness concerns"); Tom Tyler et al., *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 GROUP PROCESSES & INTERGROUP REL. 99, 114 (1999) (reporting laboratory studies that differentiated between evaluations before versus after experiencing a procedure and finding that in post-experience evaluations process matters more than outcome).

⁹¹ *See* Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 322 (2006) (noting the "widespread" research finding that, "holding outcomes (especially undesirable ones) constant, people are significantly more satisfied if they rate as 'fair' the process that resulted in that outcome"); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 66–70, 205 (1988) (describing laboratory and field studies suggesting that perceptions of greater procedural justice generally produce perceptions of greater distributive justice, regardless of whether the outcome is positive or negative, but noting

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that they are also quite satisfied with procedures that yield unfavorable outcomes so long as they perceive the process as having been fair.⁹² Thus, by offering procedures that disputants find fair in terms of process, courts can increase the satisfaction of disputants who subsequently prevail in some sense, as well as those who are less personally favored by the outcome.

The procedural justice literature suggests that laypeople's subjective perceptions of the legal system are critically important for several reasons. The first is philosophical. Legal scholars have argued that individual choice or preference is the benchmark of procedural justice,⁹³ and that if parties unanimously choose a given procedure for resolving the dispute between them, then justice requires adoption of that procedure.⁹⁴ Moreover, people's attitudes are important because, to the extent possible, legal decisions should be based on a consensus of the parties to the dispute about what is just. Citizens should be able to embrace willingly the resolutions reached in legal proceedings; they should *want* to accept those solutions. In other words, "justice does not flow only from the interpretation of legal doctrines by legal

that some studies show an attenuation of this effect when the outcome is positive and that it continues to be strong when the outcome is negative).

⁹² Hensler, *supra* note 9, at 89. Hensler notes:

[O]ver the past twenty years, a long line of studies of real world disputes have demonstrated conclusively that Thibaut and Walker's fundamental insight—that people's judgments about dispute resolution procedures derive primarily from their perceptions of procedural fairness rather than perceptions of outcome favorability—is not just an artifact of experimental conditions.

Id. In high-stakes situations, people value fair process even more. See Tyler, *supra* note 11, at 369.

⁹³ See generally Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997). See also Bingham, *supra* note 22, at 880 ("Self-determination includes procedural justice notions of a disputant's perceptions of control and fairness."); Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 490–91 ("The ex ante argument holds that a procedure is fair if all parties would have agreed to the procedure had they been able to contract for it in advance of ('ex ante') their dispute.").

⁹⁴ By way of example, Bruce Hay has argued:

Suppose we are deciding between two possible dispute resolution procedures, called A and B. Under my approach, if a given individual would choose A over B, then justice to that individual is satisfied by adoption of A; and if all affected individuals prefer A to B, then justice to those individuals requires adoption of A.

Hay, *supra* note 93, at 1803. He then focuses his analysis on the dilemma that arises when people change their preferences—for example, by preferring one procedure for dispute resolution in general, before a dispute arises, and then a different procedure once he or she is personally involved in an actual dispute. *Id.* at 1809.

scholars, judges, and/or philosophers, who tell people what is a just solution of their problems."⁹⁵ Justice also develops from the concerns, needs, and values of the people who bring their problems to the legal system.⁹⁶ In this sense, the parties "own" their dispute and should shape the process that will be used to resolve it.⁹⁷ Although the legal system and society more generally have legitimate interests in the interactions of citizens and the reduction of conflict, those interests should not preclude concern about the more individualized needs of the disputants.⁹⁸

Second, attending carefully to disputants' preferences makes good political sense. As political scientist Austin Sarat has noted, "it would be strange, indeed, to call a legal system democratic if its procedures and operations were greatly at odds with the values, preferences, or desires of the citizens over a long period of time."⁹⁹ Court programs that focus primarily on meeting the needs of the judges in terms of docket reduction, rather than the needs of the courts' constituents, are likely to foster discontent and mistrust.¹⁰⁰ There is recent evidence of a public "crisis of confidence" in the

⁹⁵ Tyler, *supra* note 37, at 874.

⁹⁶ *Id.* at 869–902. See also Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 99 (2002) (arguing that the subjective perceptions of disputants are an important consideration in evaluating ADR programs "because how people feel about their governmental institutions is so important in a democracy").

⁹⁷ *Id.* at 97 ("Because it is the time, money, and sense of fairness of the *parties* that is primarily at stake, it is not obvious why courts should not give the parties the opportunity to decide for themselves how to weigh, in any given case, these sometimes-competing values.") (emphasis in original); Menkel-Meadow, *supra* note 21, at 2690 (explaining why disputants should be regarded as the "owners" of their disputes).

⁹⁸ Tyler, *supra* note 37, at 875 (making a similar argument).

⁹⁹ *Id.* at 871–72 (quoting Sarat).

¹⁰⁰ Judge Wayne Brazil has articulated this point well:

[A] preoccupation with reducing docket congestion . . . can impose pressures on neutrals and on program administrators that can threaten the quality and integrity of ADR processes . . . It also is bad for the courts that sponsor docket-driven ADR programs because such programs invite the parties to think that the court's primary goal is to get rid of them. When the people believe that an institution's goal is to get rid of them they are likely to resent that institution, not respect it. Thus, docket-driven ADR programs can make the people feel alienated from their public institutions and from the democracy those institutions run. A very different picture emerges when . . . instead of looking primarily inward, toward themselves, courts . . . look primarily outward, toward the people. The preoccupation in these courts is not with institutional self-protection but with serving the people.

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legal system¹⁰¹ and a negative public impression of the courts.¹⁰² This public sentiment is problematic because the smooth functioning of the legal system depends on respect from the citizens.¹⁰³ This is so because, "while some coercion by authorities is possible, the legal system relies heavily on the voluntary cooperation of most citizens."¹⁰⁴ Importantly, empirical research has shown that disputants are more likely to voluntarily comply with the outcomes of legal procedures when those outcomes are produced by procedures that disputants regard as fair, where "fairness" entails their having some meaningful level of control over process.¹⁰⁵ Studies by McEwen and

Wayne D. Brazil, *The Center of the Center For Alternative Dispute Resolution*, 6 PEPP. DISP. RESOL. L.J. 313, 315-16 (2006). Brazil further argues that:

Courts that permit efficiency values to drive them into offering only one kind of ADR process, with that one being assertively evaluative, not only lose or reduce their capacity to be responsive to a range of case-specific circumstances and a variety of party interests and needs (both practical and psychological), they also increase the risk of party disaffection.

Brazil, *supra* note 96, at 123.

¹⁰¹ Barbara J. Pariente, *A Profession for the New Millennium: Restoring Public Trust and Confidence in Our System of Justice*, 74 FLA. B.J. 50 (2000) (arguing that lack of public confidence is due both to misunderstanding the courts and the courts' failure to meet citizens' needs); Tyler, *supra* note 37, at 872 (explaining that interviews with the public suggest that the American justice system is suffering from a crisis of public confidence); NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (reporting on a large-scale study of the U.S. adult population, which found that only 23% had a "great deal" of trust in the courts in their communities, but finding that a majority of those polled had a "very high" confidence in judges).

¹⁰² Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis": ABA Journal Survey Results Surprise Some Legal Experts*, 4 ABA J. REPORT 40 (Sept. 30, 2005), available at <http://www.abanet.org/journal/redesign/s30survey.html>; Gary M. Stern, *Polishing the Image: Lawyers Appear Low in Public Status, Moving Some Bar Groups to Action*, <http://www.law.com/jsp/article.jsp?id=1030821219888> (last visited July 16, 2007).

¹⁰³ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 110 (1990). See also Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 606 n.137 (2004) (arguing that "seeking out and listening to the voices of individual disputants is essential for the maintenance of the legitimacy of the various public institutions that now embrace mediation" and citing references noting the importance of procedural justice in maintaining citizens' respect for the courts).

¹⁰⁴ Tyler, *supra* note 37, at 873.

¹⁰⁵ See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 262 (1981) [hereinafter McEwen &

Maiman, for example, compared mediation to adjudication in small claims cases in Maine.¹⁰⁶ They found that disputants rated mediation more

Maiman, *Mediation in Maine*] (reporting a study suggesting greater voluntary compliance for mediation compared to adjudication). See also Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 904–05 (1991). Dayton notes that:

[D]ata compiled by the Federal Judicial Center show that . . . demands for a trial de novo are made in a significant percentage of cases referred for arbitration, ranging from a low of forty-six percent in the Eastern District of New York to a high of seventy-four percent in the Middle District of Florida and the Western District of Michigan.

Id.

¹⁰⁶ McEwen & Maiman, *Mediation in Maine*, *supra* note 105. Just over half of the total sample was offered a choice between mediation and adjudication; mediation was selected in three-quarters of the cases. *Id.* at 248. Parties involved in the other cases (just under half the sample) were directed to either adjudication or mediation. *Id.* McEwen and Maiman ascribed the higher compliance rates they found in mediated cases to psychological forces that arise from the consensual processes involved in arriving at mediated outcomes. *Id.* at 263–64. Feelings of outcome legitimacy and obligation, they argued, are an inherent result of mediation. *Id.* It was later argued that the differences in compliance may not have been entirely due to differences in opportunities for consensus-building, but that compliance was dependant in part upon one of the parties' "making concessions," whether that be that they admitted they owed some money or other obligation to plaintiff, made concessions either on the dollar amount of the claim, or reciprocal obligations or payment schedules. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 20, 37, 42–43 (1984). See also Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. OF SOC. ISSUES 127, 138 (1985).

[T]he compliance data lend some support to the liability-admission hypotheses, but not unequivocal support. Compliance rates were higher for partial- than for no-liability cases, but only when cases were adjudicated. The fact that compliance rates were actually higher for settled than for adjudicated cases, and that there was no difference between no-liability and partial-liability cases that were settled are consistent with McEwen and Maiman's (1984) hypothesis. Thus compliance might be explained by a combination of both hypotheses.

Id. Other studies have also found high compliance rates for mediation. See, e.g., Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 640 (2002) ("Annual surveys conducted by this court regarding compliance rates with mediated agreements indicate that 95% of the agreements are kept by the parties."). But see Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 348–51 (1995) (finding that defendants were only marginally more likely to comply with the specific monetary award or agreement than were defendants who adjudicated to resolution, and that those who mediated their disputes did not differ from those who experienced

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favorably than adjudication. In particular, in 44% of the mediated cases both parties viewed the settlement as fair, while only 24% of the parties who experienced adjudication viewed their procedure as fair. Further, parties were more likely to comply with mediated settlements—71% fully complied with mediated outcomes while only 34% fully complied with adjudicated ones.¹⁰⁷ By implication, it seems as though the fairness attributed to the mediation process increased the probability that the agreements would be upheld. Similar findings have been reported in victim-offender mediations in which victims and offenders have the opportunity to speak relatively informally and have a voice in developing their own restitution plan. Empirical studies of these programs suggest that offenders are more likely to comply with the outcome, and are less likely to reoffend, compared to those who participate in procedures that grant them less control.¹⁰⁸ Thus, there are solid pragmatic reasons for attending seriously to disputants' subjective evaluations;¹⁰⁹ court-connected programs that grant parties some level of meaningful process control are likely to be perceived as fair, which can promote voluntary compliance with outcomes.

3. Increased Use of Voluntary Court-Connected ADR

As discussed earlier, ADR programs vary in whether participation is voluntary or mandatory.¹¹⁰ Given the growth of ADR programs and the fact that public perceptions of ADR have grown more favorable over the last several decades,¹¹¹ many scholars have noted with surprise the relatively low

adjudication "in the degree to which they felt obligated to meet the terms of the agreement or award"); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695 (2002) (explaining that "Few studies have examined the impact of general civil case mediation beyond the mediation session. These studies found that mediated agreements did not increase compliance or reduce subsequent disputing compared to non-mediation resolutions but did result in fewer filed appeals").

¹⁰⁷ 53% fully complied in cases which were adjudicated following an unsuccessful mediation. McEwen & Maiman, *Mediation in Maine*, *supra* note 106, at 262.

¹⁰⁸ Mark S. Umbreit, Robert B. Coates, & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298 (2004).

¹⁰⁹ See Shestowsky, *supra* note 9, at 216-23.

¹¹⁰ See *supra* note 7 and accompanying text.

¹¹¹ See Thomas C. Waechter, *Survey Says: Litigants Like What They See in Mediation*, 22 ALTERNATIVES TO THE HIGH COST OF LITIG. 93 (2004) ("Mediation, as well as other forms of alternative dispute resolution, is gaining popularity in the United States every year."); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 449 (2004) (noting a rise

participation rates in voluntary programs.¹¹² One reason for low usage might be that disputants are not being offered options that appeal to them.¹¹³ That is, if participation in voluntary programs is low, then the procedures in those

in arbitration use over the past 10–20 years); Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 614 (2002) ("Federal judiciary statistics indicate that the percentage of district court civil cases that settle or voluntarily dismiss has risen from 11.2% in 1981 (the year the Sixth Circuit started its program) to 48% percent now, and the number of federal civil trials has dropped approximately 36% in the last five years."); Michael A. Landrum, *Through the Mists: ADR and Product Liability Claims in the Twenty-First Century*, 27 WM. MITCHELL L. REV. 713, 727 (2000) ("[T]he societal trends toward personal empowerment and accountability, coupled with the aspect that life is moving with continually escalating velocity, generating impatience with ponderous decision-making processes, militates toward a greater public acceptance of ADR processes in product liability cases."); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 218 (1995) ("It is fair to say that, within a very short time period (less than two decades), Frank Sander's call has been heard. It is worth mapping that shift, from disinterest and some hostility toward ADR to the embrace of it as a mode of responding to disputes.").

¹¹² Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 329 (2003) ("Historically, voluntary mediation programs have not been well attended."); Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 202 (2002).

Despite the increasing number of court-connected ADR programs and participants' generally high levels of satisfaction with ADR, programs that depend on voluntary participation attract relatively few cases. For instance, 350 divorce cases were mediated in Maine during one year when child custody mediation was voluntary, compared to 4,918 cases mediated during one year after mediation became mandatory. Cases are less likely to enter ADR at the parties' request than as the result of a judicial referral, a pre-dispute contractual agreement between the parties (e.g., private binding arbitration), or a statute or court rule mandating ADR use in cases involving a certain subject matter or dollar [range].

Id. It is interesting to note that when courts institute voluntary ADR programs, such programs can have a tertiary effect of increasing the use of private ADR in their jurisdiction. Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us about Court Mediation?*, 9 DISP. RESOL. MAG. 8 (2003) (noting that judicial activism and mandatory mediation leads to increased voluntary use of private mediation by lawyers).

¹¹³ Presumably, when presented with a range of alternatives and asked to choose from among them, people will choose the alternative they prefer. *But see* David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418 (1979) (using psychological research to distinguish between fairness, preferences, and choices in the face of alternatives).

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programs may simply not be sufficiently strong competitors relative to trial. To increase participation, courts should direct greater energy towards determining what would attract disputants, which would involve a close empirical examination of their preferences.

One might argue that it matters less that *courts* offer what disputants prefer given the existence of private ADR providers, working outside the court-connected system, who might offer exactly what they desire. In fact, some scholars have argued that certain procedures, namely those that are more facilitative and interest-based, such as facilitative mediation, are best left as options existing outside of the court environment.¹¹⁴ It is important to consider, however, that court-connected programs can be free or highly subsidized by the courts (for example, offering the first three or four hours of the neutral's service gratis), thereby making ADR more accessible to those who might otherwise ultimately forego a meaningful resolution of their conflict.¹¹⁵ When courts offer subsidized but unattractive procedures, the less wealthy disputants are likely to be the ones who end up using them, with wealthier ones opting for private services. A particularly unfortunate consequence of this scenario is that these less wealthy constituents of the courts are likely to face further relative injustice if they are dissatisfied with the process or the outcome and wish to proceed with a trial *de novo*, because they are less likely to be able to afford this follow-up option compared to their more affluent counterparts.¹¹⁶ For this reason, courts can promote

¹¹⁴ See, e.g., Hensler, *supra* note 9, at 97–98.

¹¹⁵ United States District Court for the District of Utah, ADR Program, <http://www.utd.uscourts.gov/documents/adrpage.html> (last visited July 16, 2007) (explaining that in the United States District Court, District of Utah, the neutrals' preparation time is free and each party contributes \$50 per hour if additional time is needed); Superior Court of California, County of Santa Barbara, Court Administered Dispute Resolution, <http://www.sbcadre.org> (last visited July 16, 2007) (explaining that cases with an amount in controversy that does not exceed \$50,000 may be sent to Limited Mediation at court expense in Santa Barbara, CA); Maryland Judiciary, Local ADR Programs, <http://www.courts.state.md.us/family/adr-local.html> (last visited July 16, 2007) (listing court ADR programs in Maryland that offer free services, or accept payments on a sliding scale, or fee waivers); National Center for State Courts, Small Claims, <http://www.ncsconline.org/WC/CourTopics/StateLinks.asp?id=2&topic=SmaCla> (last visited July 16, 2007) (describing several free and reduced-fee ADR programs for small claims cases across the country).

¹¹⁶ Besides the financial disincentive often associated with requesting a trial *de novo*, see *supra* note 74, there are also other direct financial costs associated with trial (e.g., lawyers' fees, payments to expert witnesses), as well as indirect financial costs (e.g., lost wages). David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91–92 (1983). It is important to note that even though financial costs have not been shown to be

access to justice on the part of the less wealthy by marrying the financial perks of their programs with procedures that are deemed desirable and fair.¹¹⁷

Moreover, if we accept the premise that promoting party preferences can increase party self-determination, procedural justice, and voluntary compliance with outcomes, it matters greatly which procedures courts offer. If courts do not respect disputants' needs in meaningful ways, they may end up tarnishing the very enterprise of court-connected ADR. This is particularly true for courts that require parties to attempt settlement through ADR before they can gain access to trial. If, in this context, courts force parties to use a procedure that they dislike, and adding insult to injury, to pay for this "opportunity" whereas they would pay nothing for the neutral's time if they went to trial, one would expect the parties to regard the procedure as

the factor that most influences people's assessment of procedures, see *infra* notes 160–65 and accompanying text, this is not inconsistent with the fact that the cost of a procedure can itself be a barrier to ADR (and in that way be the most important factor preventing them from using it). The latter is a cost issue that arises at the start of a dispute, whereas the former cost issue arises after the dispute has ended, and applies only to people who have afforded entry into ADR, used it, and then reported that fair treatment was more important to them than the financial costs of the procedure, or the money they may have been awarded as an outcome.

¹¹⁷ As Judge Wayne Brazil has argued:

[O]ne of the very few ways a court can be useful to a substantial segment of the population is to offer a free or low-cost ADR program. By offering such a program, a court acknowledges the real-world limitations, for many people, of the services it traditionally has offered. As important, the court demonstrates that it understands that its mission is to offer useable and respect-worthy service to as large a percentage of the people who have judicially cognizable disputes as possible. This kind of acknowledgment and demonstration earn a court the gratitude and respect of the people and gratitude toward and respect for our public institutions is essential to the long-range health of our polity.

Brazil, *supra* note 44, at 243. See also Ward, *supra* note 37, at 92.

Some programs require parties to pay for court-annexed ADR . . . It is ironic that parties who opted to litigate rather than to pay for private dispute resolution may be required to pay in any event before being allowed to use the public 'free' dispute resolution traditionally offered by courts.

Id. Some argue that "party self-determination" is consistent with improving access to justice. See Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons From Abroad*, 56 DEPAUL L. REV. 569, 583–85 (2007) (arguing that because party self-determination and other core ADR features allow disputants to resolve issues according to their own preferences outside of formal government structures, these approaches can "enforce disputants' legal rights").

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relatively unfair, which, in turn, might reduce voluntary compliance with the outcomes.¹¹⁸ This, in turn, might land the dispute back in line for trial (if the parties can afford this option), possibly with greater palpable conflict between the parties. The effectiveness of the ADR program in terms of promoting conflict resolution would consequently be compromised, as might be the disputants' confidence in the legal system.

In sum, there are many solid historical, theoretical, and pragmatic reasons for implementing party preferences in court-connected ADR. Once a court commits to promoting disputant-focused values in its program, it must carefully consider how different program features might implicate those values. Fortunately, courts generally have the flexibility to then design their programs accordingly.

II. SYSTEMIC ANALYSIS: CAN COURT PROGRAMS IMPLEMENT DISPUTANTS' PREFERENCES?

A. Courts Have Flexibility in Program Design

Although legislation in some jurisdictions might require parties to use ADR for certain types of cases, program design is largely determined by the

¹¹⁸ Brazil, *supra* note 44, at 261 (suggesting that courts are unfair to disputants when they offer a neutral's time in adjudication for free but charge for a neutral's time in ADR procedures, especially when those procedures are mandatory). Litigants at trial do not pay for the judge's time. See Michael H. Leroy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 160 (2002) (stating that disputants pay employment arbitrators \$2000 a day, unlike judges to whom litigants do not owe a fee). Some programs mandate high hourly rates for mediator compensation. See, e.g., Rules of the Circuit Court of Cook County, Rule 20.03, <http://www.cookcountycourt.org/rules/rules/rulespart20.html#rules20.03> (last visited July 16, 2007) (mandating mediator fees at \$250 per hour); United States District Court for the Western District of Oklahoma, Panel of Mediators, <http://www.okwd.uscourts.gov/files/adr/mediatorlist.pdf> (last visited July 16, 2007) (listing the mediators that are court-approved in the United States District Court for the Western District of Oklahoma, along with their hourly fees, many of which are \$150, and as high as \$350); Superior Court of California, County of Sacramento, ADR Panel List, <http://www.saccourt.com/civil/ADR/mediation/docs/CV-E-MED-173%20ADR%20Panel%20List.pdf> (last visited July 16, 2007) (listing the court-approved mediators for the Sacramento Superior Court, 37% of which list hourly fees of \$300 or higher). See also Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1620 (2005) (suggesting that negative consequences might arise if courts decided to finance their ADR systems by charging litigants a low flat fee for services).

courts at both the federal and state levels.¹¹⁹ In the federal system, although the ADR Act¹²⁰ sets out some definite requirements in regards to arbitration, it leaves much to the determination of individual courts in terms of which procedures to offer and how to design their programs.¹²¹ Not surprisingly, the characteristics of programs in the federal courts vary widely.¹²² This diversity is also apparent in state courts.¹²³ One source of variability across programs pertains to whether ADR is voluntary or mandatory. Some courts require the use of ADR, others offer voluntary participation,¹²⁴ and still others sponsor programs that have both mandatory and voluntary

¹¹⁹ Crowne, *supra* note 16, at 1794–95. For examples of such legislation at the state level, see *infra* notes 124–32.

¹²⁰ 28 U.S.C. §§ 651–58 (1998).

¹²¹ See Ward, *supra* note 117, at 84 (noting the wide variety of ADR procedures offered in the federal courts: "arbitration, mediation, early neutral evaluation, summary jury trial, mini-trial, judicial settlement conference, and additional iterations, such as med-arb"); 28 U.S.C. §§ 654, 655, 657 (providing that courts may not mandate participation in arbitration and eliminating the binding effect of arbitrations by allowing either party to request a trial de novo).

¹²² James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. CONTEMP. LAW 1, 4–5 (1995). As of 2004, 63 districts authorized mediation; 28 authorized some form of nonbinding arbitration; and 23 authorized ENE. See United States Courts, The Federal Judiciary, <http://www.uscourts.gov> (last visited July 16, 2007). See also PLAPINGER & STIENSTRA, *supra* note 6, at 14–19 (describing in detail various ADR programs in federal district courts). All of the federal appellate courts have in-house ADR programs as well. ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 2 (1997) (finding that pursuant to Fed. R. App. P. 33, all thirteen federal Courts of Appeals have implemented programs to facilitate settlement by a third party neutral); Jennifer E. Shack and Danielle Loevy, Summary of Court-Related ADR in Illinois, Center of Analysis of Alternative Dispute Resolution Systems (2004), http://www.caadrs.org/downloads/adr_summary.pdf (last visited July 16, 2007) (describing the application of the Alternative Dispute Resolution Act of 1998 to federal courts and noting that the "wording allows for great latitude in deciding which process to use, leading to variations in the types of programs established in each of the U.S. District Courts in Illinois").

¹²³ See generally Steven S. Clarke et al., NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (Susan Keilitz ed., 1994); National Center for State Courts, <http://www.ncsconline.org> (last visited July 16, 2007).

¹²⁴ See, e.g., Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 718 (1999) (noting that court programs vary in whether they are mandatory or voluntary); PLAPINGER & STIENSTRA, *supra* note 6, at 7–8 (reporting that some federal court ADR programs are mandatory, whereas others are voluntary).

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components.¹²⁵ Although some states mandate arbitration for certain types of cases,¹²⁶ mandatory programs typically sponsor mediation rather than arbitration.¹²⁷ Some courts require mediation for particular types of cases,¹²⁸ or require mediation if requested by one party.¹²⁹ Others make mediation a

¹²⁵ See, e.g., Yolo Superior Court, Local Rules of Superior Court of California, County of Yolo, <http://www.yolo.courts.ca.gov/forms/CourtRules.pdf> (last visited July 16, 2007) (Yolo County local rules 6.1 and 6.2 indicate that the court offers both voluntary and mandatory mediation are offered.); Alternative Dispute Resolution in Superior Court of Delaware, http://courts.delaware.gov/Courts/Superior%20Court/ADR/ADR/adr_delaware.htm#d2 (last visited July 16, 2007) (offering both arbitration which is mandatory or by agreement, and voluntary mediation).

¹²⁶ Senft & Savage, *supra* note 112, at 329. See also Illinois Courts, Court-Annexed Mandatory Arbitration Annual Report Fiscal Year 2004, <http://www.state.il.us/court/Administrative/ManArb/2004/Arbitration.asp> (last visited July 16, 2007) (explaining that in Illinois, court-connected arbitration is a mandatory, non-binding form of ADR, subject to damages within certain limits); WASH. ST. CT. R. 16 (2005) (requiring arbitration for disputes involving \$35,000 or less in damages); Deschutes County Circuit Court Supplementary Local Rules, Mandatory Arbitration Program, <http://www.deschutes-court.ojd.state.or.us/Rules/rules.html#13.005> (last visited July 16, 2007) (imposing mandatory arbitration for all matters involving \$50,000 or less); Albert Yoon, *Mandatory Arbitration and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the West*, 6 AM. L. & ECON. REV. 95, 96 (2004) (explaining that 19 states require pretrial arbitration for medical malpractice claims).

¹²⁷ 28 U.S.C. § 652(a) (2005) (stating that federal courts cannot order parties to participate in an arbitration to which they have not agreed). Most federal court ADR programs offer mediation. See Stipanowich, *supra* note 48, at 848–49.

¹²⁸ See, e.g., 29 U.S.C. § 173 (1994) (providing that mediation must take place when Federal Mediation and Conciliation Services decides to mediate collective bargaining dispute); CAL. FAM. CODE § 3170 (West 1996) (ordering mediation if it appears that custody, visitation, or both are contested); IOWA CODE § 598.41 (1995) (allowing courts to require party participation in custody mediation); CAL. INS. CODE § 10089.75 (2006) (allowing Commissioner to mandate mediation for insurers in fire or marine insurance claims); MONT. CODE ANN. § 39-71-2408 (2005) (mandating non-binding mediation for worker's compensation); NEV. REV. STAT. § 3.475 (2005) (mandating mediation for child custody cases in counties of more than 400,000 residents); N.C. GEN. STAT. § 7A-38.3(c) (2005) (mandating mediation for farm-nuisance litigation); WASH. REV. CODE § 59.20.080(2) (2006) (mandating mediation for mobile home eviction disputes); OR. REV. STAT. § 107.755 (1995) (requiring mediation in cases where child custody, parenting time, or visitation are in dispute); see also Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 378–82 (2001) (identifying family law, employment disputes, bankruptcy disputes, and medical malpractice suits as areas of law for which mediation is commonly mandated).

¹²⁹ See, e.g., HAW. REV. STAT. § 205-5.1 (2004) (providing that, if one party requests mediation, all other parties to the dispute may be required to participate); MINN.

prerequisite to filing an action.¹³⁰ In other instances, the parties are not compelled to mediate, but suffer negative consequences, such as the loss of the right to recover lawyers' fees, if they do not.¹³¹ Programs that leave participation entirely up to the parties are also common.¹³² Voluntary mediation and ENE in the District of Columbia Federal District court, for example, are based primarily on voluntary submission to ADR.¹³³ The Contra Costa County Superior Court is another example of a voluntary program. It offers several options, including mediation and arbitration.¹³⁴

Court programs also vary in the number of procedures they offer.¹³⁵ Although some courts have embraced the multi-door model,¹³⁶ the majority

STAT. § 125 A.26 (1998) (requiring mediation in special education disputes if requested by one of the parents); MO. REV. STAT. § 452.403 (2005) (stating that, at the request of a grandparent denied visitation with a minor grandchild, the court may order mediation with any party who has custody or visitation rights).

¹³⁰ See, e.g., Nancy G. Maxwell, *Keeping the Family out of Court: Court-Ordered Mediation of Custody Disputes under the Kansas Statutes*, 25 WASHBURN L.J. 203, 203 (1986) (describing Kansas statute that allows courts to order parties in child custody cases to mediate their dispute before resorting to trial).

¹³¹ See, e.g., FLA. STAT. ANN. §§ 723.037–723.038 (West 1988).

¹³² The Civil Justice Reform Act plans of several other federal districts, including Massachusetts, Oregon, and Utah, allow parties to select ADR voluntarily. See ERICKA GRAY, MULTI-DOOR COURTHOUSE 108 (1993), available at http://www.ncsconline.org/WC/Publications/KIS_ADROthNatlSympCtDispDoor.pdf. Some courts require attendance at a conference to discuss the possibility of using ADR and then offer voluntary participation. See, e.g., W.D.N.Y. LOCAL R. CIV. P. 16.1(a)(3)(F), <http://www.nywd.uscourts.gov/document/civilamendments2004.pdf> (last visited July 16, 2007) (requiring counsel for each party to discuss the possibility of alternative dispute resolution in a pre-trial conference); D.N.D. LOCAL R. CIV. P. 16.2(B), http://www.ndd.uscourts.gov/pdf/local_rules.pdf (last visited July 16, 2007) ("The court strongly encourages participation in ADR at an early stage of the case and requires that the parties, in all civil cases not excluded from application of this rule, discuss early ADR participation and the appropriate timing of such effort.").

¹³³ Plapinger & Shaw, *supra* note 79, at 154.

¹³⁴ CONTRA COSTA COUNTY SUPER. CT. LOCAL R. 103; Superior Court of California County of Contra Costa, Alternative Dispute Resolution, Frequently Asked Questions, <http://www.cc-courts.org/> (last visited July 16, 2007).

¹³⁵ Stipanowich, *supra* note 48, at 849. Research compiled in 1996 showed that of the 94 federal district courts, 23 offered only one ADR procedure. PLAPINGER & STIENSTRA, *supra* note 6, at 14. Of the 23 courts that offered a single form of ADR, only four courts made ADR mandatory. *Id.* The Northern District of Indiana required that most civil cases participate in a single mandatory mediation session. *Id.* at 134. The Southern District of New York required mandatory mediation for all civil cases involving money damages. *Id.* at 199. ENE in the District of Vermont and the Northern District of California is mandatory depending on the case type. *Id.* at 51–53.

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is more selective in the procedures offered; most courts offer a single alternative to trial, typically mediation or arbitration.¹³⁷ But some offer two or more procedures.¹³⁸ They usually retain considerable discretion in designing the features of these procedures, thereby creating many variants on the same theme.¹³⁹

In addition, programs generally have discretion to offer adjudicative (e.g., arbitration) or nonadjudicative procedures (e.g., mediation). Mediation is the most common procedure offered by federal and state courts, but arbitration is also common.¹⁴⁰ Some courts offer other options, such as

¹³⁶ See *supra* note 76 and accompanying text.

¹³⁷ Stipanowich, *supra* note 48, at 848–49; F. Peter Phillips & Sandra A. Seller, *Y2K and ADR: Alternatives to Litigating Year 2000 Business Disputes*, 571 PLI/PAT 999, 1070 (1999) (noting that only a few state courts, including New Jersey, Texas, and Massachusetts, offer a menu of options); Plapinger & Shaw, *supra* note 79, at 152 (explaining that some courts institutionalize only one ADR procedure). See also Brazil, *supra* note 96, at 123–24 (observing that courts offering a menu of options either refer almost all civil cases to the menu, or authorize judges to refer selected matters to particular procedures and noting the potential problems regarding parties' and lawyers' perceptions of fairness that are more likely to emerge when a program offers a single procedure).

¹³⁸ See, e.g., Contra Costa County Superior Court, <http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageId=1781&parentID=1604&nodeID=3> (last visited July 16, 2007) (offering four procedures); United States District Court, District of Idaho, Alternative Dispute Resolution, <http://www.idd.uscourts.gov/adr.htm> (last visited July 16, 2007) (offering three procedures); Cook County Circuit Court, Illinois, <http://www.cookcountycourt.org> (last visited July 16, 2007) (offering two procedures).

¹³⁹ For example, some offer facilitative mediation, whereas others provide evaluative mediation. See, e.g., NEBRASKA DISPUTE RESOLUTION OFFICE, NEBRASKA MEDIATION AND ADR HANDBOOK FOR JUDGES AND COURT STAFF 1 (2006), available at http://court.nol.org/mediation/pdf/adr_handbook.pdf (last visited July 16, 2007) (documenting that the "Nebraska regional centers primarily use a facilitative, interest-based mediation model"); Hon. Pinkie T. Toomer, *Probate Court Mediation is Unique in Georgia*, THE FULTON COURT REPORTER (Jan. 2005), http://www.co.fulton.ga.us/Fulton_County/departments/The_Court_Reporter_Jan_05.pdf (last visited July 16, 2007) (noting that the Fulton County, Georgia Probate Court sends nearly every case to evaluative mediation); Shestowsky, *supra* note 69 (describing various ways that courts structure summary jury trials). Ward, *supra* note 37, at 84 (noting that the variety of ADR offered in the federal courts includes "arbitration, mediation, early neutral evaluation, summary jury trial, mini-trial, judicial settlement conference, and additional iterations, such as med-arb").

¹⁴⁰ Stipanowich, *supra* note 48, at 848–49 (stating that at least two-thirds of federal district courts—63 of 94—currently have some form of mediation program and noting that 28 authorize some form of nonbinding arbitration and 23 authorize ENE); Rachel A.

settlement conferences,¹⁴¹ summary jury trials, or hybrid procedures such as Med-Arb.¹⁴²

Importantly, courts also vary in whether they allow disputants to decide which procedure is used, or shape a procedure for their particular dispute. The Circuit Court of Cook County, Illinois, for example, offers both arbitration and mediation, but a case's eligibility for each is dictated by court rules and based on case type and the amount in controversy.¹⁴³ Other courts, like the Superior Courts of Santa Clara County and the County of San Mateo, California, offer a menu of options from which parties can choose.¹⁴⁴ Disputant control can also vary across courts that offer the same single procedure. For example, some courts offering mediation mandate the use of evaluative mediation, whereas others, such as state courts in Alaska and Virginia, allow the parties to choose between the facilitative and evaluative models.¹⁴⁵ Some programs allow disputants to select their mediator,¹⁴⁶ a

Wohl, *Beyond the Courthouse*, 7 NO. 4 DISP. RESOL. MAG. 21, 21 (2001) (stating that over the past 15 years courts in nearly 40 states have created their own offices of dispute resolution to support various forms of alternative dispute resolution).

¹⁴¹ See generally Jonathan S. Rosenthal, *Defining and Understanding ADR Terms*, 38 MD. BUS. J. 18, 20–21 (2005) (describing a settlement conference as a conference where the parties, their lawyers, or both "appear before an impartial person to discuss the issues and positions of the parties in the action in an attempt to resolve the dispute").

¹⁴² Med-Arb is a combination of mediation and arbitration in which the parties agree in advance that they will mediate for a set amount of time, and that, if the dispute is not resolved through mediation in that period they will proceed to arbitration. LEONARD RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 16 (2005). Only two federal districts have incorporated Med-Arb into their programs. See PLAPINGER & STIENSTRA, *supra* note 6, at 4 (outlining ADR in federal system).

¹⁴³ Compare Major Case Court-Annexed Civil Mediation, Circuit Court of Cook County, Actions Eligible, <http://www.cookcountycourt.org/divisions/index.html> (last visited July 16, 2007) (stating that mediation is available only in major civil cases seeking damages in excess of \$30,000) with Non-Judicial Offices, Circuit Court of Cook County with <http://www.cookcountycourt.org/about/non-judicial.html> (last visited July 16, 2007) (stating that the upper limit for eligibility for arbitration is a case value of \$30,000).

¹⁴⁴ Santa Clara County Superior Court ADR, <http://www.sccsuperiorcourt.org/civil/adr/default.htm>; Superior Court of California, County of San Mateo, Appropriate Dispute Resolution Programs, <http://www.sanmateocourt.org/adr/index.html> (last visited July 17, 2007).

¹⁴⁵ Compare VA. R. PROF. CONDUCT §2.11(d) (2005); ALASKA JUDICIAL COUNCIL, *MEDIATION, ALTERNATIVE DISPUTE RESOLUTION AND THE ALASKA COURT SYSTEM* §B(5) (1999), <http://www.ajc.state.ak.us/reports/medguide99.pdf> (last visited July 16, 2007) with MICH. CT. R. 3.216 (2006) (allowing parties to a divorce proceeding to request an evaluative mediation).

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feature which has been associated with higher levels of disputant satisfaction with mediated outcomes and perceptions that the outcomes were fair.¹⁴⁷

Because courts have considerable latitude in program design, they face a wide range of choices. How do courts ultimately determine the shape of their programs? Given that it is the *disputants* who bring their conflicts to the court, and that *disputants* are most affected by the process and outcomes produced by the procedures,¹⁴⁸ one might assume that courts accord great weight to disputants' preferences. However, a review of available evidence, presented in the next section, suggests that courts often view disputants' preferences as a secondary concern at best.

B. Courts Can Make Disputants' Preferences a Greater Priority

The only way to know with reasonable certainty how much disputants' preferences were prioritized in designing a given court program would involve analyzing program design meetings or similar records of the program development process.¹⁴⁹ Such analysis is a goal worthy of future research.¹⁵⁰

¹⁴⁶ For example, Cook County in Illinois allows parties to designate a mediator, who may or may not be on the list of court-certified mediators, *see* Cook County, Illinois Local Circuit Rule 20.03(A), <http://www.cookcountycourt.org/divisions/law/mediation1.htm#selection> (last visited July 16, 2007); U.S. DIST. CT., E.D.N.Y. LOCAL CIV. RULE 83.11(b)(2), http://www.nyed.uscourts.gov/adr/Mediation/Local_Rule_8311_/local_rule_8311_.html (last visited July 16, 2007).

¹⁴⁷ LEILA TAAFFE, SHINJI MOROKUMA, & ELIZABETH ELLEN GORDON, PARTICIPANT SATISFACTION SURVEY OF GEORGIA'S COURT-CONNECTED ADR PROGRAMS, GEORGIA OFFICE OF DISPUTE RESOLUTION 9-16 (2000), *available at* www.godr.org/pdfs/finalsji.pdf (last visited April 22, 2008) (although less than 4% of disputants surveyed were involved in mediator selection, those who provided input were more satisfied with the outcome and felt that the outcome was more fair to them.).

¹⁴⁸ The present article does not address the societal or precedential ramifications of settling disputes. For a thoughtful analysis of such issues, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). It is important to note that unlike outcomes produced by the trial process, court-connected ADR outcomes are not precedents.

¹⁴⁹ A good example of indirect participation by parties in the program design process comes from the San Mateo Multi-Option ADR program. Telephone Interview with Sheila Purcell, Program Director, Multi-Option ADR Project, Sup. Ct. of Ca., County of San Mateo (Jan. 8, 2007) (reporting that the court conducted a "needs assessment" which involved sending surveys to a variety of community organizations and individuals to solicit their ideas on what the court should do in its ADR program, and it also used focus groups to obtain feedback on an initial program design).

Until such research is conducted, however, the relative weight given to their preferences must be determined by less direct means. A review of these indirect means suggests that there is significant opportunity for courts to better prioritize the understanding and implementation of disputants' preferences. For example, guidelines which suggest that courts place strict dollar cutoffs for their arbitration programs imply that the needs or preferences of disputants be subordinated to such concerns.¹⁵¹ Moreover, the preambles of many statutes and local court rules that establish ADR programs suggest that a primary goal of many courts is to conserve time and money.¹⁵² Lastly, some reputable sources report that the needs or desires of the *judges* in certain jurisdictions have been the driving force behind the institution of certain ADR procedures.¹⁵³

¹⁵⁰ Future research could determine which factors were actually used in developing court programs by observing and analyzing program design meeting discussions, or studying committee minutes or similar reporting devices.

¹⁵¹ Harry N. Mazadoorian, *Institutionalizing ADR: A Few Risks, Many Benefits, Some Guidelines for System Design*, 12 ALTERNATIVES TO HIGH COST. LITIG. 45, 45 (1994) (discussing the risk of placing dollar value limits on cases referred to arbitration in terms of turning away cases that are good candidates for arbitration simply because they exceed a certain dollar amount). See also *supra* notes 115 and 143 (listing examples of courts that limit cases according to their dollar value). In some instances, these cutoffs are imposed on the courts by the legislature. See WEST'S ANN. CAL. C.C.P. § 1141.11 (requiring superior courts with 18 or more judges to impose arbitration for "all nonexempt unlimited civil cases . . . if the amount in controversy, in the opinion of the court, will not exceed \$50,000 for each plaintiff, but leaving arbitration as an option for superior courts with fewer than 18 judges and stating that such courts could create local rules mandating arbitration).

¹⁵² For examples, see *supra* notes 32–35 and accompanying text.

¹⁵³ Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085, 1106–07 (noting that ADR is growing among judges in Tennessee and that their interest in new procedures comes from a desire to be relieved of "repeat customers"); Jennifer E. Shack & Danielle Loevy, Summary of Court-Related ADR in Illinois (2004), http://www.caadrs.org/downloads/adr_summary.pdf (last visited July 16, 2007) (describing ADR in Illinois courts and noting that "Differences in implementation are often caused by informal arrangements within a circuit, such as in the 18th Judicial Circuit, where probate cases have been referred to mediation because the presiding probate judge was a proponent of ADR"); Welsh, *supra* note 103, at 589 ("In the court-connected context, this research reveals that mediation programs have evolved largely to reflect the needs and preferences of judges and attorneys. [B]ecause many judges perceived mediation as an effective means to resolve cases and reduce congested dockets, many courts make disputants' participation in court-connected family and non-family civil mediation mandatory.").

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But perhaps the clearest way to estimate how much weight courts give to disputants' preferences involves noting whose opinions of their programs they value. This weight can be assessed by examining whose assessments are solicited in program evaluations, which ostensibly are intended to obtain feedback for the purpose of improving programs. On this front, courts appear more likely to collect data on the attorney's perceptions of ADR than they are to assess the perceptions of disputants,¹⁵⁴ and when they do assess disputants' opinions it is often done indirectly by asking lawyers to report their *perceptions* of their clients' perceptions,¹⁵⁵ which is a poor substitute for

¹⁵⁴ By way of example, in Roselle Wissler's review of 27 evaluations of general jurisdiction court mediation programs,, only 16 surveyed disputants and 20 surveyed attorneys; and in her review of 15 appellate mediation programs, only 1 surveyed disputants whereas 6 surveyed attorneys. Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004). See Wisconsin civil court system ADR program, <http://www.wicourts.gov/about/committees/ppacadr.htm#2> (specifying that lawyers and Circuit court judges were surveyed); McAdoo, *supra* note 14, at 403 (explaining that when the Minnesota Supreme Court directed the State's ADR Review Board to evaluate its Statewide ADR rule, "the Board chose to conduct an in-depth statewide survey of attorney opinions, and a review of court case files in four selected districts in the state"); Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. DISP. RESOL. 229, 242-43 (describing a study of mediator performance, conducted by the Office of the Circuit Mediators for the U.S. Court of Appeals for the Sixth Circuit which involved distributing "a four-page questionnaire to all attorneys who had participated in mediation within a given timeframe").

¹⁵⁵ McAdoo, *supra* note 14, at 411 (evaluation of Minnesota court-connected ADR gathered data from attorneys regarding client preferences, for example, whether clients were "more interested in settling and staying out of court, whether clients "like mediation," and whether mediation "provides greater client satisfaction."); McAdoo & Hinshaw, *supra* note 14, at 513-15 (reporting on a study commissioned to assess the Missouri Supreme Court's revised civil (non-family) ADR rule; the survey asked attorneys various questions about their clients, including whether clients liked mediation, whether mediation provided clients with a greater sense of control, and whether mediation provided greater client satisfaction). Some courts have assessed disputants' perceptions directly. See, e.g., Administrative Office of the Courts, Evaluation of the Early Mediation Pilot Programs 4 & 8, <http://www.courtinfo.ca.gov/reference/documents/emppt.pdf> (reporting on programs in the Superior Courts of Fresno, San Diego, Contra Costa and Sonoma Counties where both "parties and attorneys . . . were asked to rate their satisfaction regarding the process of mediation, the performance of the mediator, the fairness of the mediator, the mediation process, and the outcome of the mediation and their willingness to recommend or use mediation again") (last visited July 16, 2007); Superior Court of California-County of San Mateo, Multi-Option ADR Project (MAP), Neutral Evaluation Guidelines,

asking disputants directly.¹⁵⁶ Contrasting how regularly a reduction in case dockets and expenses (not generally of prime importance to disputants)¹⁵⁷ are cited as important data collection variables is particularly striking.¹⁵⁸

A review of who is surveyed in field research also suggests that disputants' needs and preferences are often overlooked. As Les Lopes, former chair of the Metropolitan Board of the *Society of Professionals in Dispute Resolution* ("SPIDR") once remarked:

While I was [at a recent] conference . . . [a] successful and highly respected mediator in Florida . . . began to describe the recent research project she had completed with a group of colleagues. They had surveyed a large number of customers and asked them what they expected from their mediators . . . When I asked who these customers were, she replied, "Lawyers, of course." Her answer made perfect sense. In the marketplace, the customer is not only the one who makes a choice, but also the one most likely to make the same choice again. Thus, the disputants who come and go are not the customer,

http://www.sanmateocourt.org/getforms/forms/localforms/ADR-CV-4_Neutral_Evaluation_Guidelines.pdf, (last visited July 16, 2007) ("Submission of Post-Session Evaluation Forms: In accordance with local rule 2.3(i)(5), the neutral evaluator and all attorneys and clients shall complete and submit evaluation forms within 10 days of the session."); Yolo County, <http://www.yolo.courts.ca.gov/forms/Client%20Evaluation%20rev%203-07.pdf> (last visited July 16, 2007).

¹⁵⁶ See *infra* notes 159–70 and accompanying text.

¹⁵⁷ Research suggests that a reduction in case-related expenses is not critically important to typical civil disputants. See *supra* notes 39–41 and accompanying text. Moreover, research suggests that the effects of monetary outcomes are nonmonotonic. D.E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, J. APPLIED SOC. PSYCHOL. 1085, 1092–95 (1989).

¹⁵⁸ In 2003, the Research and Statistics Task Force of the American Bar Association Section of Dispute Resolution embarked on a project to help courts use their information technology to collect the data needed for program evaluation. The Task Force invited court program administrators to indicate the factors they felt were most important to use as data collection variables and which ones their court already collected. Ten items received an average importance rating of five or greater on a scale of one to seven and were identified as the most important variables for courts to collect. Only one of them related to the subjective impressions of the parties. In abbreviated form, the items were: Was ADR used for this case?; What ADR procedure was used?; Timing information (the date the claim docketed, date of first ADR session, the point in the docket duration that ADR occurred, and the final disposition date of the case); Did ADR dispose of any claims?; What precipitated the use of ADR?; Was there a settlement without ADR?; Case type; The cost of the ADR process (in dollars and time) to the participants and the court; Whether the disputants used more than one form of ADR; How satisfied the parties and court were with the process, outcome, and the third-party neutral.

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but rather the lawyers who continually frolic in the murky waters of conflict, thus changing our very focus of who it is we serve as mediators. In this case, progress created the opposite of its intended purpose.¹⁵⁹

This example illustrates the broader point that data collection is often geared towards understanding the preferences of *lawyers*.¹⁶⁰ And, when researchers *do* set out to study the preferences of disputants, they often gather data by asking *lawyers* to report the perceptions of their clients.¹⁶¹ That is, just like in court evaluations, field research often solicits lawyers to report party reactions to court-connected ADR rather than surveying disputants directly. This methodology assumes that lawyers can adequately channel their clients' private assessments, an assumption that is not well-founded.

¹⁵⁹ Lela P. Love & James B. Boskey, *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1 (1999–2000).

¹⁶⁰ Many studies have focused on understanding lawyers' viewpoints. See, e.g., Lisa Brennan, *What Lawyers Like: Mediation, NLJ/AAA Survey: Less Rigid ADR Preferred to Arbitration*, 158 N.J.L.J. 589 (1999) (reporting on a mail survey of "leading litigators" and "Fortune 500 general counsel"); McAdoo & Hinshaw, *supra* note 14, at 475 (reporting on study of lawyers); Eugene R. Quinn, *Using Alternative Dispute Resolution to Resolve Patent Litigation: A Survey of Patent Litigators*, 3 MARQ. INTELL. PROP. L. REV. 77, 94 (1999) (reporting on survey of patent litigators). Of course, studying the perspectives of legal professionals is important in its own right, especially given their role in informing clients about ADR.

¹⁶¹ See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 389–90 (observing that "studies to-date have been content to measure lawyer satisfaction as a proxy for party satisfaction"). However, some academic research has examined what disputants want from dispute resolution. Compare Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 254–55 (Joseph Sanders & V. Lee Hamilton eds., 2001) (describing lawyers' process evaluations, and their assessments of how satisfactory and fair mediation was for their clients) with Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 155, 156–62 (describing quantitative and qualitative data from tort plaintiffs in ordinary and mass tort litigation, and concluding that they want to present evidence, find out what happened, and vindicate their rights); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153–54 (1984) (presenting research suggesting that once people go to court with their conflicts it is because they feel they no longer have conflicts of interest they can negotiate; instead, they feel they have a principal grievance for which they seek an authoritative conclusion). Other academic researchers have attempted to survey disputants in addition to legal professionals but failed to get an adequate response rate from disputants. See e.g., Brett et al., *supra* note 77.

Lawyers often claim that they can speak on behalf of their clients and that they understand disputants' needs and interests and thus can make the necessary judgments about how disputes should be resolved from their perspective.¹⁶² Possibly because of the cognitive orientation borne from their adversarial legal training, however, disconnects frequently arise between the perceptions of legal professionals and disputants.¹⁶³ Lawyers commonly fail to understand or appreciate their clients' experiences, perceptions, priorities, or interests.¹⁶⁴

¹⁶² Welsh, *supra* note 103, at 578.

¹⁶³ *Id.* See also William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 645 (1980) (observing that professionals often define their clients' needs to match the services they can provide). Welsh, *supra* note 161, at 601–02. As noted in one empirical study:

Judges do not appear to consider the maintenance of party relationships or the development of remedies based on extra-legal (or simply non-legal) norms as particularly compelling substantive justice objectives. Looking again at the survey question regarding factors that judges consider when ordering parties to mediation, few selected either "continuing relationship to preserve." And although it is true that apologies and other non-legal relief sometimes are achieved in mediation, the data suggest that these outcomes are not what judges expect, experience or value when they order parties to mediation.

Bobbi McAdoo & Nancy A. Welsh, *Look Before you Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 415 (2004). Hensler, *supra* note 9, at 88 (noting that "Perhaps the most startling finding of procedural justice research for legal experts was the discovery that, contrary to what many judges and lawyers believe, people's assessments of dispute resolution processes and outcomes are not wholly dependent upon each other").

¹⁶⁴ See, e.g., Welsh, *supra* note 103, at 601–02 (observing that "attorneys often fail to hear their clients' experiences, perceptions or objectives"); Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97, 111–14 (2002) (finding significant discrepancies between lawyer and client ratings of how important various lawyering skills were, and reporting that lawyers tended to underestimate the importance that clients placed on skills that demonstrated concern); Hensler, *The Real World of Tort Litigation*, *supra* note 161, at 156–63 (contrasting tort plaintiffs' desire for accountability and vindication of legal rights with lawyers' monetary focus in assessing claims); Jean Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 320–31 (1999) (describing monetary, non-monetary, and psychological divergences between lawyers and clients that result in lawyers affecting settlements in ways that diverge from their clients' self-defined interests); Jeffrey Goldfien & Jennifer Robbenolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 315 (2007) (noting that when lawyers are more likely to evaluate trials in terms of their

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Furthermore, what legal professionals such as lawyers, judges, and court administrators think is important to disputants often turns out not to be.¹⁶⁵ For example, despite what legal professionals may have anticipated, economic concerns seem to play at most a minor role in shaping disputants' attitudes. Empirical evaluations of laypeople's post-experience judgments of fairness and their satisfaction with the courts have shown remarkably little relationship to the financial cost of the case or how long its resolution took.¹⁶⁶ Cost, in particular, is much more weakly related to satisfaction and

financial value, one can expect an unfavorable outcome for clients focused on non-financial goals); Roselle Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 467 (2004) (explaining that lawyers paid on a contingent-fee basis might place less significance on clients' non-monetary goals); Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 321–22, 325–26 (1998) (reporting on an observational study and noting a "striking" tendency for law students to fail to hear or acknowledge "critical" information revealed to them at the beginning of the initial lawyer-client meeting, and to express empathy when clients expressed emotions about their situations, and describing the negative consequences that can result from these failures).

¹⁶⁵ Tyler, *supra* note 11, at 372 (observing the wide differences between the features of existing formal procedures and what truly matters to disputants, and arguing that these discrepancies are the result of the different training and focus of legal professionals). For example, a recent focus group study of judicial officers and court administrators in California concluded as follows:

It is important to note that there is a gap—and perhaps a significant gap—between the assumptions of judicial branch members about how the public perceives the fairness of the courts and the actual opinions of the public. Many participants in the judicial member focus groups assume that court users' confidence in or approval of the courts depends on whether their case outcome was favorable. However [our] research shows that Californians' trust and confidence in the courts depend less on the outcome of individual cases than on their treatment and the fairness of the procedures they see at work in court. Thus, many judicial branch members may underestimate the critical importance of the perception of procedural fairness to the public.

TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS, REPORT, JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS 2–3, 34 (2006).

¹⁶⁶ LIND ET AL., *supra* note 47. This research was conducted on disputants after they experienced a dispute resolution procedure. It is possible that a greater concern for costs would be reported at the pre-experience stage. *See also* Tyler, *supra* note 43, at 233 (reporting four large-scale studies of laypeople's perceptions of courts and legal authorities, and concluding that perceptions were not primarily associated with outcomes or outcome-related judgments like the cost or speed of the litigation, but with how fairly they felt such entities treat people); Warren, *supra* note 43, at 13 (commenting on a set of

perceived fairness than legal professionals might expect. In essence, the compromised ability of lawyers to accurately assess their clients' assessments is likely due in part to the fact that their own reactions to court-connected procedures can diverge dramatically from those of disputants.¹⁶⁷

As a result of such lawyer-disputant disconnects, lawyers' assumptions and occasional "imaginary conversations" with their clients cannot help but be unreliable with respect to discerning correctly what appeals to disputants.¹⁶⁸ Laypeople's needs reflect a clear and describable *psychological* model of concerns.¹⁶⁹ This model "departs substantially from the model of legal decision-making into which lawyers and judges are socialized in law school and which dominates discussions about law in law journals and judicial education conferences."¹⁷⁰ A gap often exists, then, between desirable treatment as described by the consumers of the legal system and

studies and concluding that "although . . . the public expresses great dissatisfaction with the high cost of access to the courts and the slow pace of litigation, it is not primarily those factors, but rather the fairness of court processes, that is associated with varying levels of public trust" in the courts).

¹⁶⁷ See, e.g., WAYNE KOBBERVIG, *MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION* 23–25 (1991) (demonstrating that disputants who used mediation rated it more favorably than did disputants who experienced adjudication, while lawyers rated adjudication more highly and were more likely than disputants to assess adjudication as efficient); Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 106 (pointing out that parties' ratings of the fairness of mediated outcomes were lower than the lawyers' ratings); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, in *ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE* 1 (2006) (describing the "surprise" felt in New Jersey courts when it observed parties shifting cases from bilateral negotiation to more financially costly arbitration, and reporting the main reason as a relatively greater opportunity for voice).

¹⁶⁸ Welsh, *supra* note 103, at 579, 665 (suggesting that because disputants enter mediation to reach some kind of resolution, mediators assume that settlement is the goal); E. Allan Lind et. al., *supra* note 47, at 955, 981–82 (explaining that policymakers often "assume that the only things that matter to litigants, beyond whether they win or lose, are their litigation costs and the delay they encounter in obtaining a judgment. Indeed cost and delay are often viewed as the major reasons for litigant discontent with the civil justice system . . . data are available from research in other contexts, however, that raise questions about the accuracy of these assumptions" and then presenting their own research on what matters to litigants, drawing a similar conclusion).

¹⁶⁹ Tyler, *supra* note 37 (noting the disconnect between what disputants want and what the legal system offers them).

¹⁷⁰ *Id.* See also William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 *LAW & SOC'Y. REV.* 661, 672 (1985) (reviewing data suggesting that people feel frustrated when restrictions are placed on the way they can tell their story in formal adjudication).

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what legal authorities might assume these disputants want.¹⁷¹ Insofar as disputants' perceptions are often assessed and reported indirectly by lawyers, or program administrators whose intuitions about these preferences also might be "biased" by legal training, it becomes clear how easily disputant preferences—even when contemplated at the design stage—might be misunderstood, distorted, or misapplied.

Specifically, minimizing flawed conclusions about disputants' preferences requires relying on sound empirical findings about what those preferences are. This would entail gathering data from disputants directly rather than relying on third-party intuitions about, or reports of, disputants' needs. In determining what to offer, courts would do well to reflect on the advice of Judge Richard A. Posner:

[T]he success or failure of [a proposed alternative to the conventional ways of resolving legal disputes] must be verifiable by accepted methods of (social) scientific hypothesis testing. I am unconvinced by anecdotes, glowing testimonials, confident assertions, and appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing. Judicial opinions and law review articles alike are full of assertions . . . that have no demonstrable factual basis. If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.¹⁷²

To the extent that courts seek to promote disputant-related values such as self-determination, or other values that rely upon the subjective satisfaction of disputants, such as procedural justice, it becomes especially important that they understand and implement disputants' preferences. Reliance on sound empirical research to gain the necessary understanding is critical. To that end, it helps to synthesize what has been "discovered" thus far about laypeople's preferences for dispute resolution procedures and point out the

¹⁷¹ Tyler, *supra* note 37 (noting the disconnect between what disputants want and what the legal system offers them).

¹⁷² Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986). As an example, intuitions and assumptions about the cost and time savings of ADR have been subjected to empirical investigation and have generally not been supported. Dayton, *supra* note 30, at 895 (arguing that Federal district courts have been permitted and encouraged to devote significant public resources to implementing ADR programs that are assumed, but have not been shown, to reduce costs and delays).

important issues in need of empirical clarification. It is to these issues that we now turn.

III. METHODOLOGICAL CRITIQUE: HOW CAN WE BETTER UNDERSTAND DISPUTANT PREFERENCES?

A. *What We Already Know about Disputants' Preferences*

For over three decades, researchers have been investigating laypeople's preferences and assessments across a variety of conflict situations, including legal disputes.¹⁷³ These studies have generally taken one of two forms. One form is the laboratory experiment, wherein research participants assess the attractiveness of various procedures for hypothetical disputes.

A classic example of this experimental research paradigm dates back to early studies by research psychologist John Thibaut and lawyer Laurens Walker. These researchers and their colleagues initially focused on preferences for different forms of adjudication. Using the conventional experimental method, they compared the procedural preferences of individuals who were either in front of or behind a "veil of ignorance" regarding their role in a physical assault dispute.¹⁷⁴ Participants who were placed behind the veil were not informed of their role (i.e., they were not assigned the role of "victim" or "defendant"), whereas those in front of the veil were informed of their role.¹⁷⁵ The weight of the evidence strongly favored the victim over the defendant; the defendant was therefore "disadvantaged" by the facts of the case, whereas the victim was relatively "advantaged."¹⁷⁶ Participants were given descriptions of the following procedures: inquisitorial (an activist decisionmaker who is also responsible for the investigation), single investigator (a moderately activist decisionmaker assisted by a single investigator who is used for both disputants), double investigator (a less activist decisionmaker is assisted by

¹⁷³ For a review of this early social psychological research, see Jeffrey Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 PSYCHOL. BULL. 379 (1980). See also Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution, A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 214-23 (2004).

¹⁷⁴ John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974). The term "veil of ignorance" was coined by the philosopher John Rawls. The purpose of the device is to cancel out self-interest in the analysis of hypothetical social arrangements. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹⁷⁵ Thibaut et al., *supra* note 174.

¹⁷⁶ *Id.* at 1276-78.

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several investigators), adversary (essentially adjudication—the decisionmaker is relatively passive and the process is chiefly controlled by the disputants through advocates who represent them in an openly biased way), and bargaining (disputants meet in an attempt to resolve the dispute without the intervention of any third-party).¹⁷⁷ The study found that participants in all roles—whether behind or in front of the veil of ignorance—liked the adversary procedure best.¹⁷⁸ Adversarial representation induced greater trust and satisfaction with the procedure and produced greater satisfaction with the outcome, independent of the favorability of the outcome to the participant.¹⁷⁹ Participants also deemed the adversary procedure most fair. Notably, they found it to be significantly more just than procedures that were nonadjudicative (e.g., bargaining).¹⁸⁰

Thibaut and Walker argued that preferences for procedures develop from people's perceptions of which procedures are most fair. In order to ascertain the fairness of a procedure, people tend to evaluate the distribution of control that the procedure offers. That is, people tend to find procedures more just when they distribute control between disputants and third parties in a way that appeals to them. This analysis provided the basis for explaining earlier findings suggesting that people prefer adjudicative procedures to nonadjudicative ones.¹⁸¹

Since Thibaut and Walker's classic studies, laboratory research has followed a variety of similar formats. Most commonly, participants are randomly assigned a perspective or "role" (e.g., the viewpoint of the plaintiff or the defendant) from which to consider the facts of a hypothetical legal dispute. They subsequently read descriptions of procedures and evaluate the

¹⁷⁷ *Id.* at 1274–75.

¹⁷⁸ The decreased preference ordering of the other four procedures differed according to experimental condition. *Id.* at 1280. Those in the advantaged role preferred the inquisitorial and single adversarial model more than did those in disadvantaged role and those in the disadvantaged role preferred the adversary procedures more than did those who were disadvantaged. *Id.* at 1280–81. Moreover, participants in the disadvantaged role were found to prefer bargaining procedures more than those in the advantaged role. *Id.* at 1282. Participants in the disadvantaged role and those behind the veil indicated greater preference for those procedures that favored the disadvantaged party, while advantaged participants did not. Thibaut et al., *supra* note 174, at 1283. The best predictor of preferences, regardless of experimental condition, was perceived fairness.

¹⁷⁹ JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE* 80 (1975).

¹⁸⁰ *See id.* at 113–15.

¹⁸¹ *See* Shestowsky, *supra* note 9, at 218–19.

attractiveness of each for the given dispute.¹⁸² Less commonly, participants participate in a simulated dispute resolution procedure to which they are randomly assigned, and then asked to rate that procedure.¹⁸³

Another common format for procedural preference research is the field study. In this paradigm, individuals involved in an actual legal dispute are asked about their experiences. Field researchers generally contact disputants retroactively, asking them which procedure they used for an already-resolved dispute and how they would evaluate it.¹⁸⁴ Unlike laboratory studies, field

¹⁸² See *id.* at 214–23; Regina A. Schuller & Patricia A. Hastings, *What do Disputants Want? Determinants of Procedural Preference*, 28 CANADIAN J. OF BEHAVIOURAL SCI. 130, 135 (1996); Michael W. Morris et al., *Person Perception in the Heat of Conflict: Negative Trait Attributions Affect Procedural Preferences and Account for Situational and Cultural Differences*, 7 ASIAN J. SOC. PSYCHOL. 127, 133–34 (2004); Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319, 328–29 (1976).

¹⁸³ See, e.g., Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APP. SOC. PSYCHOL. 295, 300 (1974); William Austin et al., *Effect of Mode of Adjudication, Presence of Defense Counsel, and Favorability of Verdict on Observers' Evaluation of a Criminal Trial*, 11 J. APP. SOC. PSYCHOL. 281, 288 (1981); Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531, 1535–36 (1978).

¹⁸⁴ See, e.g., Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation & Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1170 (1993) (Researchers conducted phone interviews with 132 of 158 coal miners, 69 of which experienced grievance mediation and 89 of which had their grievances arbitrated.); Brett et al., *supra* note 77, at 260 (Researchers mailed post-dispute surveys to disputants and their attorneys and ultimately examined 449 cases administered in five states by providers of dispute resolution services; cases included contract, construction, personal injury, property damage, and environmental disputes.); Lind et al., *supra* note 47, at 954 (Researchers conducted telephone interviews of 122 litigants whose cases were tried in Fairfax County, Virginia, 74 litigants whose cases had been arbitrated in Bucks County, Pennsylvania, and 90 in Prince Georges County, Maryland who had participated in judicial settlement conferences.). One published study surveyed parties earlier in the dispute resolution trajectory. See Lamont E. Stallworth & Linda K. Stroh, *Who is Seeking to Use ADR? Why Do They Choose to Do So?*, 51 DISP. RESOL. J. 30, 33–34 (1996) (Researchers mailed questionnaires to 3,000 parties with cases pending at the Illinois Human Rights Commission and offered them alternatives of fact-finding, mediation, or final and binding arbitration to determine their perceptions of the procedures and which they would choose; 109 employers and 102 claimants responded to the survey.).

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studies generally do not randomly assign participants to procedures, and they necessarily involve participants responding to different disputes.¹⁸⁵

There are a multitude of studies across both research paradigms, with interesting variability in findings. A plethora of experiments have supported the hypothesis that people tend to prefer more adjudicative procedures, such as arbitration, to less adjudicative ones, such as mediation.¹⁸⁶ Similarly, the famous RAND field study of tort cases in three jurisdictions examined tort litigants' perceptions of procedural justice in settlement conferences, adjudication, and arbitration, as well as in bilateral negotiation. It found that real-world civil litigants accorded higher procedural fairness to non-binding arbitration and trial than to the (less adjudicative) judicial settlement conference.¹⁸⁷

However, results from other research sharply contrast with the conclusion that laypeople generally favor adjudicative procedures. This other research suggests a preference for nonadjudicative procedures (e.g., mediation). For example, Pierce and his colleagues, who investigated preferences in a landlord-tenant dispute, found that mediation was not only preferred to arbitration, but it was the most favored procedure involving a

¹⁸⁵ This research is not limited to the use of dispute resolution procedures in a court setting, but neither is the research using laboratory experiments. See Bingham, *supra* note 37, at 108.

¹⁸⁶ See, e.g., Thibaut et al., *supra* note 174, at 1280; LaTour et al., *supra* note 182, at 349 (finding that arbitration was generally the most preferred procedure); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13, 29 (1978) (concluding that the most preferred procedure corresponded to arbitration). Other research has also suggested that adjudicative procedures are regarded as more fair, more satisfying, more accurate, and unbiased from a post-experience perspective relative to nonadjudicative ones. See, e.g., E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980).

¹⁸⁷ LIND ET AL., *supra* note 47, at 74. The RAND research group conducted thirty-minute telephone interviews with plaintiffs and defendants in tort cases that had been resolved in the preceding twelve months in three mid-Atlantic region suburban courts. To control for selection bias, they contrasted each procedure with its most common alternative, bilateral negotiation. The original analysis compared disputants' responses to the three third-party procedures and found that perceptions of procedural fairness were highest for trial and non-binding arbitration and lowest for judicial settlement conferences. A reanalysis of the data compared each of the third-party procedures to unassisted negotiation and concluded that, compared to negotiation, the average procedural fairness scores were higher for disputants who went to trial or arbitration but the same or lower for those who used settlement conferences. Lind et al., *supra* note 47 at 965-66.

neutral third party.¹⁸⁸ Laboratory research by Heuer and Penrod also found that arbitration was not preferred to nonadjudicative procedures such as mediation or bargaining.¹⁸⁹ Similarly, the often-cited field research on labor grievances by Stephen Goldberg, Jeanne Brett, and their colleagues found that mediation was favored to arbitration.¹⁹⁰ Other field studies have also supported the idea that disputants are more attracted to mediation.¹⁹¹

¹⁸⁸ Robert S. Peirce et al., *Complainant-Respondent Differences in Procedural Choice*, 4 INT'L J. CONFLICT MGMT. 199, 200, 204–06 (1993) (finding that the modal sequence of procedural choices was: negotiation, mediation, advisory arbitration, arbitration, and then "struggle," which was defined as "pressure tactics . . . employed in an effort to get the other party to give in").

¹⁸⁹ Larry B. Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERSONALITY & SOC. PSYCHOL. 700, 704–06 (1986). *See also* Austin et al., *supra* note 183, at 297 (finding that defendants were least satisfied when an adjudicative procedure yielded an unfavorable outcome, thereby countering previous studies suggesting that adjudicative procedures are the most preferred across all outcome conditions).

¹⁹⁰ Brett et al., *supra* note 77, at 264 (finding higher rates of satisfaction with mediation compared to arbitration, in surveys of disputants and their lawyers across four major third party service providers). In another study, researchers conducted telephone interviews with 132 of 158 coal miners, 69 of whom used grievance mediation and 89 of whom experienced grievance arbitration. Those whose conflicts were mediated reported higher satisfaction on measures of procedural justice, control over outcome, and third-party fairness relative to those who participated in arbitration. They concluded that "disputants value the opportunity to control the outcome and to help develop and negotiate that outcome," and that this may "explain why mediation, in which disputants have both of these opportunities, is preferred to arbitration, where they do not." Shapiro & Brett, *supra* note 184, at 1175–76. As Bingham points out, grievance arbitration is analogous to the non-binding arbitration procedure offered in court programs. Bingham, *supra* note 37, at 110. Nevertheless, those who used mediation rated their neutrals as fairer, relative to those who used arbitration. Shapiro and Brett speculated that disputants might find advisory arbitration preferable to binding arbitration because it grants them outcome control but they concluded that "(b)oth of these procedures . . . may be less preferable than mediation because neither provides disputants with both outcome control and the opportunity to develop the outcome." Shapiro & Brett, *supra* note 184, at 1176.

¹⁹¹ *See, e.g.,* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998) (reporting results from a survey of Fortune 1000 employers finding that they had a strong preference for mediation over more fact- and law-based procedures such as arbitration); Jennifer E. Shack, Center for Analysis of Alternative Dispute Resolution Systems Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs, <http://www.caadr.org/downloads/MedStudyBibliography.pdf> (last visited Jan. 26, 2008) (reporting on an ambitious examination of studies of a large number and wide variety of ADR programs, primarily in state courts, and finding that "the vast majority [of participants surveyed] perceived the mediation process and outcome to be fair. In

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What to make of the findings from the hundreds of studies across these two research paradigms has proven to be a source of debate. In a symposium edition of the *Journal of Dispute Resolution*, leading dispute resolution scholars disagreed about what to conclude from this body of research.¹⁹² In the symposium's lead article, Deborah Hensler criticized the heightened reliance on mediation by many state and federal courts, particularly mandatory mediation, asserting that there is no clear empirical evidence that disputants prefer mediation to adjudicative procedures, such as arbitration. She argued:

The idea that litigants might prefer adversarial processes with the opportunity to adjudicate civil disputes to less adversarial consensual processes may startle judges and legislators who have enthusiastically embraced mediation. But it is consistent with the observation that voluntary court mediation programs rarely attract significant numbers of civil damage lawsuits. Moreover, the idea that litigants might prefer adversarial litigation and adjudication is consistent with a long line of social psychological research on individuals' evaluations of different dispute resolution procedures . . . My question is whether legislators' and judges' choice of mediation as the procedure that most gratifies these concerns is well

addition, most studies found that mediation participants were more likely to be satisfied with the process and outcome and to find them to be fair[er] than those who participated in adjudication").

¹⁹² Hensler, *supra* note 9, at 81. This debate has also been echoed in other sources. As Professor Jean Sternlight has noted:

Professor Hensler concludes, based on her review of the procedural justice literature, that disputants want third-party neutrals to resolve their disputes based on fact and law. Yet, Professor Welsh, after reviewing the same studies, disputes Hensler's conclusion that disputants view processes as more procedurally fair if they cede decisional control to a third party. Instead, argues Welsh, such studies show that "the locus of decision control is less important to litigants' perceptions of procedural justice than process elements—voice, consideration, even-handedness and dignity." With respect to mediation, Welsh has, for example, shown that the precise way in which the mediation is set up can make a great deal of difference to disputants.

Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 719 (2005) (citations omitted) (quoting Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187).

grounded. When I look to the findings of the first generation of procedural justice scholars, I see little to support this choice.¹⁹³

Others, such as Lisa Bingham, suggested that the empirical literature points to a preference for arbitration over mediation, and called for further research to clarify the parameters of this trend.¹⁹⁴

Given the controversy, Hensler raised an interesting question: "What would a system of dispute resolution based on *litigants'* preferences—rather than lawyers' self-interest or judges' beliefs about their appropriate role—look like?"¹⁹⁵ Despite decades of research trying to answer this question, the answer remains unclear. Surely, no single research project can answer all empirical questions that courts or policy-makers might like to have answered. To date, however, several reliable findings about preferences have emerged from the corpus as a whole. For example, courts would be hard pressed to challenge the conclusion that process is critically important to disputants—often just as, if not more, important than outcomes.¹⁹⁶ It would also be

¹⁹³ Hensler, *supra* note 9, at 81, 94. It is worth noting that Hensler largely restricts her review to early research in the area.

¹⁹⁴ Bingham, *supra* note 37, at 124.

¹⁹⁵ Hensler, *supra* note 9, at 81.

¹⁹⁶ The procedural justice effect—the fact that citizens care about the process by which outcomes are reached, whether favorable or unfavorable—has generally been found to hold across demographic variables such as race, gender, and well as case variables (such as type of legal issue or amounts in controversy). MacCoun, *supra* note 167, at 173 (synthesizing the body of literature and noting that the procedural justice effect has been documented across "contexts involving every major demographic category in the United States"). As Nancy Welsh points out:

[P]erceptions of distributive justice generally have a much more modest impact than perceptions of procedural justice . . . laboratory and field studies that show that greater perceptions of procedural justice generally produce greater perceptions of distributive justice, regardless of whether the outcome is positive or negative. Occasional studies show that this effect may be reduced when the outcome is positive, but also that this effect continues to be strong when the outcome is negative. Some studies have found that variations in decision control have no or much smaller effects on procedural justice judgments than variations in process control . . . and that process control may be "more important to people's feelings of being fairly treated than decision control.

Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 818 n.150 (2001) (citation omitted). See also Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 346 (2002) (noting that "researchers have found that employee satisfaction is more strongly influenced by the perceived fairness of the grievance procedure than by the perceived fairness of the grievance outcome").

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difficult to counter the more specific findings that disputants highly value opportunities for voice, fair treatment by third parties, and control over process, and that these factors heavily influence disputants' evaluations.¹⁹⁷ But, when it comes to whether disputants find adjudicative procedures or nonadjudicative procedures relatively more attractive, clarity remains elusive. And yet, given that court programs generally offer a single procedure, they would especially benefit from knowing which of the two models as applied to ADR (specifically, mediation or arbitration) is favored (or, under what specific conditions one is favored over the other).¹⁹⁸

So, the questions remain. Is mediation favored? Is arbitration favored? One way to begin to reconcile these conclusions requires analyzing the methods used in the research relied upon to reach one conclusion or the other. In fact, as argued below, many studies suggesting a preference for mediation appear to have some methodological characteristics in common that studies supporting a preference for adjudicative procedures do not share.

¹⁹⁷ Welsh, *supra* note 196, at 791, 817–22 (synthesizing the research and noting the reliability of the "voice" effect, and the importance of fair treatment and observing that "procedural justice research indicates clearly that disputants want and need to . . . control the telling of that story"); Korobkin, *supra* note 91, at 322 (noting the "widespread" research finding that, "holding outcomes (especially undesirable ones) constant, people are significantly more satisfied if they rate as 'fair' the process that resulted in that outcome"); Conlon et al., *supra* note 157, at 1087 (explaining that "[o]ne of the most consistent findings in the research on procedural justice is that dispute resolution procedures that provide high process control (i.e., control over presentation of evidence, and the handling of the "case" before a third party) to disputants will enhance perceptions of procedural and distributive fairness"). *But see* MacCoun, *supra* note 167, at 184 (synthesizing the literature and concluding that research shows that fair process matters, but that whether process or outcomes matter more "may not be answerable in a meaningful, global way").

¹⁹⁸ Perhaps there are no strong aggregate preferences to be found, in the sense that preferences may be context-dependant. The research conducted thus far, however, does not suggest that this is so—for example, remarkably few studies have detected differences relating to role in the dispute (plaintiff versus defendant) or legal issue. *See* Shestowsky, *supra* note 9, at 225–26 (reviewing previous research on the effects of role, and finding, through laboratory research, that role in a dispute did not affect which procedures were most preferred, only how strongly certain procedures were preferred); McEwen & Maiman, *supra* note 106, at 248 (comparing mediated cases with ones that underwent trial and finding no differences in case types).

B. Why Do We Know So Little?: Challenges Posed by Previous Research

Critics of the existing research have argued that it is challenging, if not impossible, to draw any strong inferences from the laboratory research in this area.¹⁹⁹ They argue that the simulations are diverse, ranging from criminal and civil legal disputes to interpersonal conflicts or collaborative tasks whose "conflict" dimension is questionable.²⁰⁰ They also claim that findings from laboratory environments do not generalize to real-life dispute resolution situations. Part of this criticism can be explained by the fact that "some methodological practices in [procedural preference research] are common in psychology [and related social sciences,] but less familiar in [law], where they are a source of discomfort[,] if not skepticism."²⁰¹ As Professor Robert MacCoun has pointed out, however, it is critical to focus on the cumulative rigor of the literature as a whole. "One can be troubled by the use of college students, simulated conflicts, structural equation 'causal' modeling, or the inherently 'subjective' nature of fairness judgments[,] [b]ut each of these issues has received considerable attention by procedural justice scholars, and the sheer heterogeneity of tasks, domains, populations, designs, and analytic methods provides remarkable convergence and triangulation."²⁰²

Thibaut and Walker's original research program was conducted through laboratory experiments and relied upon college students' assessments of hypothetical disputes. These experiments "necessarily sacrifice[d] ecological realism in order to increase the internal [or causal] validity of the hypothesis testing . . . which is essential in a domain where endogenous, reciprocal, or spurious influences are plausible."²⁰³ Most of the major variables of subsequent theoretical interest have also been experimentally manipulated, for example: the disputant's role (e.g., plaintiff vs. defendant); the evidentiary support for each party; the third party's decision; the level of the disputants' process and decision control; the decisionmaker's bias; the relationship between disputants and their relationship to the third party.²⁰⁴ As MacCoun

¹⁹⁹ E.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); Robert M. Hayden & Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments*, 3 L. & HUM. BEHAV. 21, 21-22 (1979).

²⁰⁰ See Kaplow & Shavell, *supra* note 199, at 1212 n.613.

²⁰¹ MacCoun, *supra* note 167, at 173.

²⁰² *Id.*

²⁰³ *Id.* See also Douglas G. Mook, *In Defense of External Invalidity*, 38 AM. PSYCHOLOGIST 379 (1983).

²⁰⁴ MacCoun, *supra* note 167, at 173.

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points out, experiments such as these are vulnerable to threats to external validity, but those threats are not *proof* of external invalidity, which is ultimately an empirical question.²⁰⁵ And, indeed, "most concerns about the external validity of the [procedural justice] effect (and its antecedents and consequences) have long since been settled."²⁰⁶ Indeed, a meta-analysis of 190 procedural justice studies, the source of psychological experiments on preferences, initially appeared to show significant discrepancies between laboratory and field studies; ultimately, however, this turned out to be a statistical error.²⁰⁷

Reviews of the field research have also been replete with criticisms. Field studies have been criticized for their limited utility for drawing conclusions about causation because they tend to lack random assignment, collect data from a single and perhaps aberrant court,²⁰⁸ or rely on data about experiences with procedures that are left undefined by the researchers or are otherwise difficult for the consumers of the research reports to generalize from.²⁰⁹

One way to gain greater clarity from the existing research would involve conducting a meta-analytical study. Meta-analysis typically involves reviewing the relevant empirical literature, extracting data from an entire series of studies that addresses a set of related research hypotheses, and

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 ORG. BEHAV. & HUM. DECISION PROCESSES 278 (2001)). See Yochi Cohen-Charash & Paul E. Spector, *Erratum to "The Role of Justice in Organizations: A Meta-Analysis"* [*Organizational Behavior and Human Decision Processes* 86 (2001) 278–321], 89 ORG. BEHAV. & HUM. DECISION PROCESSES 1215 (2002) (presenting the correct data analysis and concluding that the corresponding field versus laboratory correlations presented in the earlier paper were not significantly different from one another). For an explanation of the "meta-analysis" procedure, see notes 211–12 and accompanying text.

²⁰⁸ McAdoo et al., *supra* note 112, at 8 (noting that the program design effects observed in the small number of studies conducted to date might reflect circumstances particular to the courts studied and concluding on this basis that the reported effects may not be found in other courts).

²⁰⁹ Brazil, *supra* note 96, at 101 (commenting on an extensive review of court ADR studies and explaining that "reliable generalizations across the entire field are wholly inaccessible because there is such diversity of program character and quality and, presumably, in the character and quality of the studies"); Jennifer Shack, *Mediation in Courts Can Bring Gains, but under What Conditions?*, 9 DISP. RESOL. MAG. 11, 11 (2003) (reviewing studies of mediation programs and noting that many do not provide information on the characteristics of the programs).

aggregating the data for statistical analysis. Thus, basic data or statistics could be gathered from all of the past research on preferences, from laboratory studies and field studies alike, and combined into one analysis that would test for overall effects. Though a very complicated and ambitious undertaking, the benefit of this kind of structured analysis outweighs the challenges; it can explain statistically the actual trend across studies. It can accomplish this goal for several reasons. First, it can help to overcome the problem of reduced power in studies with small sample sizes; analyzing the results from a group of studies can produce more accurate and reliable conclusions.²¹⁰ Second, studies with more participants and studies with less random variation are given greater weight than smaller studies.²¹¹ Third, some methodological weaknesses in studies can be corrected statistically.²¹² For these reasons, meta-analysis is the ideal way to get a reliable global picture from the body of research that already exists.

Greater clarification can also be accomplished by future research. Researchers might focus on filling in some of the blanks in the literature by conducting experiments in the field, which would allow them to draw conclusions about causation. The best way to accomplish this goal would be through field studies that randomly assign real disputants to different procedures.²¹³ Random assignment is the best way to create groups that are reasonably equivalent on all known variables (e.g., age of disputant, nature of relationship between the disputants, case type) as well as unknown or unmeasured variables (e.g., psychological functioning of disputants).²¹⁴ Thus, comparisons of post-experience preferences across groups assigned to different procedures would allow us to conclude that preferences were in fact

²¹⁰ Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 106, at 647 n.17 (noting that meta-analysis is particularly helpful in ascertaining the overall effect of a particular factor when the pattern of findings differs greatly across courts).

²¹¹ *Id.*

²¹² *Id.*

²¹³ John S. Connolly, *A Dose of Social Science: Support for the Use of Summary Jury Trials as a Form of Alternative Dispute Resolution*, 25 WM. MITCHELL L. REV. 1419, 1426 (1999).

²¹⁴ Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 169-70 (describing the value of random assignment in the context of psychological outcomes of restorative justice procedures); Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226, 234 (1990) ("Especially important for concerns about internal validity is whether trials are randomly assigned to either include the procedure or not, thereby allowing a valid comparison between the two groups.").

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due to the procedure that was experienced rather than to some third variable associated with another factor—for example, selection bias. The multi-door courthouses which offer disputants a choice from among multiple procedures are ideal existing laboratories for such research. Because satisfaction ratings are meaningful only in a comparative context (one procedure preferred more or less compared to another), they offer the means to hold geographical location and court constant and examine differences across different procedures.²¹⁵

Thus far, ADR field research using random assignment has been rare.²¹⁶ Its rarity is unfortunate given the greatness of its value. A good example of the benefits of random assignment comes from a study of summary jury trials specifically.²¹⁷ Since their inception, summary jury trials (SJT) appeared to be a successful means of promoting settlement. Studies suggested that approximately 95% of cases tried before summary juries end up settling.²¹⁸ Some critics claimed that this figure was somewhat misleading because studies show that, in fact, over 90% of *all* cases settle before trial.²¹⁹ The sole *experimental* study on SJTs published to date helped to shed light on the debate. A court in Minnesota randomly assigned civil cases to either a control group of cases that were designated as ineligible for ADR (control group), an experimental group of cases eligible for mediation-arbitration (med-arb), or a second experimental group of cases eligible for a SJT.²²⁰ Cases were selected from the major civil cases that were filed and placed on a "standard" case track. Results indicated that 4.1% of the med-arb cases and 10% of the control cases went to full trial, whereas only 3.6% of SJT cases did so. Although this study did not demonstrate that SJTs produce significantly higher settlement rates than the med-arb option, the settlement rates for disputes undergoing SJTs were in fact higher than rates for disputes that did not undergo ADR at all. Random assignment of cases to procedures helped to ensure that selection bias did not confound the results. Without random assignment, we could not be certain, for example, that the superior settlement rates were due to the experience of ADR itself—after all, it might have been the case that parties with less complicated disputes were

²¹⁵ Hensler, *supra* note 9, at nn. 8–9.

²¹⁶ Deborah R. Hensler, *Court-Annexed ADR*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 351–67 (J.H. Wilkinson ed., Wiley Law Publications 1990) (explaining why random assignment is rare in court ADR studies).

²¹⁷ Shestowsky, *supra* note 9, at 249.

²¹⁸ Connolly, *supra* note 213, at 1452.

²¹⁹ *Id.*

²²⁰ *Id.* at 1430.

systematically choosing ADR rather than trial, and that the relative simplicity of the cases produced the higher settlement rates. Using a similar methodology to study disputants' judgments of a variety of ADR procedures could greatly enhance our understanding of preferences by eliminating possible confounds in earlier research.²²¹

Thus far, this Article has reviewed critiques on the basis of ideal social scientific methodology and statistics, such as random assignment, which are issues that might be raised in evaluating almost *any* empirical study. But the research on procedural preferences specifically has some additional issues that deserve consideration. Some of these issues relate to certain methodological differences found across studies, which might explain some of the variability in findings from past research. Specifically, studies tend to differ in the types of disputes that they examine (i.e., legal versus non-legal disputes), and in whether they examine pre-experience preferences or preferences formed after experiencing a procedure for a given dispute. In addition, past studies vary with respect to when in the history of the ADR movement they were conducted. They also vary in how the procedures are described or labeled to the participants. Each of these factors are elaborated on below.

1. *Legal vs. Non-legal Issues*

In attempting to explain why some studies have found a preference for adjudicative procedures (e.g., arbitration) whereas others suggest a preference for nonadjudicative ones (e.g., mediation), some researchers have argued that the distinction can be explained by the variation in the issues that were evaluated by the participants in these studies. In particular, they argue that studies finding a general preference for adjudicative procedures used

²²¹ In an elaborate quasi-experiment, researchers could also test for the possible effects of random assignment itself. That is, researchers could randomly assign a subset of participants to the various procedures available in a given court and compare disputants' evaluations of those procedures with evaluations offered by another subset of participants who selected those procedures for themselves. Researchers could compare statistically the evaluations of those who selected mediation with those who were randomly assigned to mediation, and compare those who selected arbitration with those who were randomly assigned to arbitration. With the same dataset researchers could also test for the overall effects of "procedure type" by comparing everyone who experienced mediation with everyone who experienced arbitration. Such a study would be useful for understanding how much importance disputants attach to the ability to choose their own procedure, how much they like different procedures, and whether the value they attach to their ability to choose procedures is dependent on the procedure that they use.

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"legal" dispute fact patterns whereas those finding a preference for less adjudicative ones used "non-legal" ones²²² (that is, ones that are purely interpersonal and do not implicate legal rights).²²³ This analytical distinction is problematic for several reasons. First, researchers tend to define and qualify a dispute as "legal" in different ways, possibly because some do not have the legal training required to properly make such classifications. For example, one study classified a landlord-tenant dispute over a monetary loss as a merely "interpersonal"—i.e., non-legal—dispute.²²⁴ Yet, in practice, landlord-tenant law is a legal specialization, and some jurisdictions even house landlord-tenant courts.²²⁵ Second, the analysis seems overly simplistic. Some studies of non-legal disputes have found a preference for adjudicative procedures, and some studies of legal scenarios have failed to find a preference for adjudicative procedures.²²⁶ Nevertheless, it would be worth exploring the legal/non-legal distinction more systematically by incorporating it as a variable in a meta-analysis to determine whether it explains a significant amount of variance in preferences across studies.

²²² For example, in a study of how people chose to resolve a "real interpersonal dispute" they had "recently experienced," 87.4% of participants reported using procedures such as persuasion or negotiation more than the third-party procedures (i.e., mediation and arbitration). E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 770 (1997). In this study, participants were free to discuss a non-legal dispute. Also, this study concerned procedural choices (which may be a function of resources such as time or money) rather than procedural preferences (which are perceived ideals for resolving a dispute).

²²³ E. Allan Lind et al., *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269, 276–81 (1994). In this study, participants "were asked to recall and briefly describe an interpersonal dispute they had had with someone in the past." They were then given descriptions of seven dispute resolution procedures and were asked to rate the extent to which they had used each to resolve the dispute. They concluded that participants in all four ethnic groups gave "relatively high ratings to persuasion and negotiation, moderate ratings to social influence, ignoring the problem, and mediation, and relatively low ratings for giving in and arbitration" and that "women preferred negotiation to persuasion and men preferred persuasion to negotiation, but for both genders both persuasion and negotiation were much preferred to the other procedures."

²²⁴ Peirce et al., *supra* note 188, at 202–03.

²²⁵ See e.g., Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 984 (2000) (noting that landlord-tenant disputes are handled in small-claims courts); Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 TEX. J. WOMEN & L. 1, 16 n.80 (2000) (discussing landlord-tenant courts).

²²⁶ Shestowsky, *supra* note 9, at 221.

Moreover, when reporting their findings, researchers conducting laboratory research should describe their hypothetical dispute scenarios in greater detail so that consumers of their research can assess the nature of the underlying conflicts that were studied.

2. *Ex Ante* vs. *Ex Post* Preferences

Temporal differences might also help to explain the conflicting conclusions in regards to preferences.²²⁷ There seems to be a nearly universal practice among empirical scholars of studying preferences at the time of a dispute, or after the dispute is resolved, but not both.²²⁸ Several scholars have discussed the possibility that *ex ante* (pre-experience) and *ex post* (post-experience) preferences differ—that is, that preferences before a dispute arises or at the time a dispute arises, differ from preferences (based on evaluation) after the procedure has ended.²²⁹ And although some empirical projects have measured assessments of a single procedure at various points in time,²³⁰ or of several procedures at several points in time after the procedures

²²⁷ See *supra* note 197.

²²⁸ Hay, *supra* note 93, at 1804.

²²⁹ See, e.g., Kaplow & Shavell, *supra* note 199, at 1209–10 (noting the perils of failing to appreciate the difference between the *ex post* view and the *ex ante* view with respect to the perceived attractiveness of various policies); Hay, *supra* note 93, at 1805 (arguing that considerations of individual welfare maximization, "justice to the litigant," respect for disputant, "autonomy and welfare," and distributional fairness favor giving priority to *ex ante* preferences); Shestowsky, *supra* note 9, at 213–14 (arguing that "pre-experience procedural preferences contrast with . . . post-experience preferences or evaluations of procedures . . . the conclusions drawn from the [pre-experience preference] research described herein are not necessarily generalizable to post-experience evaluations and the preferences represented by such evaluations"). See also Stempel, *supra* note 161, at 390 (arguing that "the party satisfaction measure and its temporal stability is an important gauge of the quality of [ADR] . . . there is data, but not definitive data . . . To fully evaluate user views of ADR, there must be sustained examination that does not measure party attitude only in the near aftermath when there may be either disappointment or euphoria"). One empirical article noted in its literature view that some studies have found a preference for mediation, whereas others have found a preference for arbitration. Schuller & Hastings, *supra* note 182, at 132. The authors suggested that the former tended to be field studies, whereas the latter tended to be laboratory studies, and then also described the different results as a "discrepancy between selection preference and post-satisfaction evaluations," explaining that field studies tend to assess post-experience attitudes. *Id.* at 131, 133. They ultimately reported two laboratory studies, neither of which examined post-experience preferences.

²³⁰ See, e.g., Welsh, *supra* note 103, at 579–80 (interviewing users of a special education mediation program regarding their aspirations and evaluations of mediation at

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have ended,²³¹ only one published empirical project has directly tested the idea that the basis for preferences might depend on whether the inquiry into disputants' preferences is made before or after experiencing a procedure.

This laboratory research, by Tom Tyler and his colleagues, was composed of four studies hypothesizing that the decisionmaking processes involved in developing *ex ante* preferences differ from those involved in making evaluations *ex post*.²³² They conducted experiments wherein they asked participants to indicate preferences for resolving hypothetical conflicts (thereby assessing pre-experience preferences) and then compared those preferences with data from surveys in which those same participants were asked to recall past conflicts—legal or non-legal—and report their assessments for the procedures they used (thereby assessing *ex post* evaluations). Tyler and his colleagues found that participants arrived at *ex ante* preferences by choosing procedures that they felt would help them to maximize their self-interest in terms of material outcomes.²³³ In contrast, disputants based their *ex post* evaluations on the quality of the treatment they

three points in time: immediately before the mediation session, immediately after the mediation, and approximately eighteen months after the mediation session).

²³¹ The few field studies that have investigated disputants' perceptions longitudinally have collected data from disputants at multiple points in time *after* they already experienced a procedure. See, e.g., Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes*, 17 FAMILY LAW QUARTERLY 497, 500–503 (1984) (describing a study wherein disputants who used either mediation or trial for custody or visitation disputes were interviewed three months after the end of their procedure and again nine to ten months later); McEwen & Maiman, *supra* note 106, at 18–19 (reporting on a study of disputants who experienced either mediation or trial which involved interviewing disputants four to eight weeks after the mediation or trial, and interviewing a subsample six to eighteen months after completion of the procedure); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 133–34 (1985) (describing a quantitative study of interviews with plaintiffs and defendants prior to “resolution hearing” and then six to twelve weeks after each case was settled or adjudicated).

²³² Tyler et al., *supra* note 90, at 115–16.

²³³ *Id.* As Tyler points out:

Laypeople typically view themselves as reacting to their experiences based upon the favorability or fairness of their outcomes. This self-perception of motivation reflects their acceptance of the “myth of self-interest,” the mistaken belief that they are instrumentally motivated. Acting on this “myth,” people make choices among procedures based upon the gains and losses they expect from various courses of action.

Tom R. Tyler, *Trust and Law Abidingness: A Proactive Mode of Social Regulation*, 81 B.U. L. REV. 361, 368 (2001).

received during the procedure. In hindsight, they were more apt to favor procedures that they felt treated them respectfully and fairly.²³⁴ This difference in criteria ex ante versus ex post suggests that disputants may end up feeling dissatisfied because their pre-experience criteria used for choosing procedures do not match their criteria for post-experience evaluations of satisfaction with those procedures.

Exactly when and how an individual's ex ante preferences for particular procedures might differ from his or her ex post preferences remains a critically important, open empirical question. The work by Tyler and his colleagues did not focus on examining legal conflict, nor was it geared towards examining how ex ante and ex post preferences might differ for the very same dispute. It also did not test for the possibility that specific *procedures* might vary in their attractiveness across the dispute resolution trajectory. But, there is good reason to believe this might be the case. Specifically, it appears as though much of the research supporting a preference for arbitration has assessed ex ante preferences for disputes that would be resolved in the future. In contrast, studies finding a preference for mediation have typically gathered ex post evaluations from disputants who already experienced a procedure to resolve an actual dispute. None of the existing published research on actual legal disputes has systematically followed disputants from the start to the end of their case to determine whether pre- and post-experience preferences differed for the same dispute. Although field studies may provide an accurate descriptive snapshot of what happened in one or more courts over a certain timeframe,²³⁵ they do not capture the fact that dispute resolution is a process that unfolds over time, and that disputants' impressions may change temporally. Similarly, typical datasets produced by researchers (sample information for a restricted time period) have limited utility for testing this hypothesis. At best, they may help to answer a few specific questions about a single point in time.²³⁶

With longitudinal data collection, however, researchers might illuminate more subtle complexities of preferences.²³⁷ This "timing" factor could also

²³⁴ Tyler et al., *supra* note 90, at 115–16.

²³⁵ Bingham, *supra* note 37, at 125.

²³⁶ *Id.*

²³⁷ Bruce Hay describes the dilemma that arises when disputants' preferences for legal procedures ex ante differ from preferences developed ex post. Hay, *supra* note 93, at 1849. He focuses his temporal conflict analysis by comparing preferences before a dispute arises with preferences that develop once a dispute comes about, which constitutes a different temporal analysis than I contemplate here. His analysis does not extend to procedural preferences that might materialize after experiencing procedures, once a given dispute has been resolved. Notwithstanding his different temporal interest, it

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be explored reliably by way of a meta-analysis, and, if it is found to be statistically significant, it would support the idea that there are essentially two psychologies of dispute resolution. There may be other moderators of disputant preferences, but this one seems most likely in light of observable trends in the existing literature.

3. *Research Time Frames and Cohort Effects*

Another factor that might help to explain the different conclusions with respect to preferences is the time period in which the various studies were conducted. A recent review of the literature on pre-experience preferences supports the idea that studies conducted earlier in the ADR movement may have found a preference for adjudicative procedures for legal disputes simply because they were conducted at a time when nonadjudicative procedures were not as culturally accepted or as widely used as they are today.²³⁸ Those who argue that adjudicative procedures such as arbitration are preferred appear to focus on older research.²³⁹ The newer research—mid-1980s onwards, which is clearly more relevant to understanding contemporary preferences—generally suggests that mediation is preferred to arbitration.²⁴⁰

is worth noting his insight into the challenges associated with making parties to a dispute use a procedure that neither party wants. He argues that:

[I]t is a problem of legitimacy and public confidence to have a legal system that systematically frustrates the actual preferences or desires of the participants [which] would have trouble commanding adherence to its decisions. Some sort of balance must presumably be struck between what the participants "want" *ex post* and what is desirable *ex ante* [which, he argues, is likely to be the preferences they hold before they are faced with an actual dispute].

Id. at 1847–49. This, of course, is a problem of democratic governance in general, and raises the issue of the proper degree of paternalism specifically, an issue which, although it surpasses the scope of this Article, is worth due consideration. As Hay points out, "it suffices to note that there may be considerable pragmatic limitations on the legal system's ability to enforce hypothetical preferences over actual ones that the parties hold." *Id.* at 1849.

²³⁸ Shestowsky, *supra* note 9, at 246–47. See also Christine Lepera & Jeannie Costello, *Alternative Dispute Resolution: What the Business Lawyer Needs to Know*, 605 PLI/LIT 593 (1999) (noting that surveys of in-house patent lawyers conducted in 1981 and again in 1991 indicated a 73% increase in "actual experience" with mediation during the ten-year period, and observing that while only one-third of the respondents to the 1981 survey favored mediation over arbitration, one-half of those responding in 1991 preferred mediation over arbitration).

²³⁹ *Id.* (reviewing the relevant research findings); Hensler, *supra* note 9, at 85–95.

²⁴⁰ *Id.*

Thus, a scholar's conclusions regarding preferences might depend in part on the relative weight he or she places on older versus newer research.

As some legal scholars have noted, a few decades ago there was considerable confusion regarding basic ADR terminology—in fact, the term "mediation" was confused regularly with "meditation."²⁴¹ In that sense, more recent findings suggesting a strong preference for mediation may, in fact, reflect a cohort effect. Today, disputants (and the lawyers who guide their decisionmaking)²⁴² probably have greater knowledge and acceptance of mediation and other procedures as compared with the typical participants of studies conducted years ago—ADR procedures are more familiar to contemporary disputants, and are used more often. This increased familiarity with certain ADR procedures may have contributed to a stronger preference for such procedures. Thus, the dates of the research projects themselves would be a useful variable to include in a meta-analysis.

²⁴¹ Welsh, *supra* note 103, at 574.

²⁴² Many commentators suggest that attorney views on ADR and settlement influence disputant choices. See, e.g., Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 593 (1987) (reporting on open-ended interviews with the disputants and lawyers in 25 informally settled divorce cases and commenting that "Most of the lawyers we interviewed say they feel responsible for encouraging informal settlement and will pressure parties to accept settlements that they, as attorneys, find reasonable"); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997) ("our experiments provide some illustrative support for the belief that lawyers have the ability—at least under some circumstances—to persuade litigants to approach the settlement-versus-trial decision from the lawyer's preferred analytical perspective."); AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 19–21 (1995) (discussing research suggesting that the lawyer influences the lawyer-client relationship and that in some cases clients have little say in the management and settlement of their cases); John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC'Y REV. 135, 156–58 (1986) (reporting a study that found lawyers have great influence on substantive decisionmaking and dominate procedural decisionmaking). Some argue that it is impossible for a lawyer to present options in a truly neutral manner; how the lawyer frames the choices will affect how the client evaluates them. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988) ("Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves."). Of course, others argue that some clients think the proper lawyer-client relationship is one in which the client is passive and the lawyer tells the client what option to pursue. See, e.g., DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 186, 197 (1977).

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4. *Labels: The Problems of Mislabeling and Bias*

Perhaps the greatest challenge involved in interpreting past research on preferences stems from how researchers have labeled procedures in their questionnaires. A common method used in laboratory research involves asking participants to read descriptions of procedures labeled "mediation," "arbitration" and so on, and then to rate how attractive they find each option.²⁴³ One source of what I call the "labeling problem" stems from the variability in how procedures are labeled across studies. A significant problem arises when researchers either mislabel the procedures they ask participants to choose between or use labels that are mismatched to contemporary versions of procedures.²⁴⁴ In her criticism of some of the early work by Thibaut and Walker, Deborah Hensler has argued:

[W]hat [some] researchers termed "mediation" most resembled non-binding arbitration of the type mandated by many courts during the 1980s: the parties (with or without the help of lawyers) presented the evidence that supported their side of the dispute, a neutral third party heard the evidence—but did not discuss it with the disputants—and then rendered an advisory non-binding opinion. The third party did not caucus with the parties or otherwise test their willingness to accept alternate resolutions of the dispute, nor did he attempt to identify the parties' interests so as to facilitate an integrative resolution. In other words, the procedure looked neither like evaluative mediation, nor like facilitative mediation (and there was certainly nothing transformative about it). What the researchers termed "arbitration" was identical to the process they described as mediation, except for the fact that the third party neutral rendered a binding decision.²⁴⁵

²⁴³ Tyler et al., *supra* note 90, at 103 (presenting participants with descriptions labeled "ignoring it," "giving in," "using friends to pressure the other person," "trying to persuade the other person," "negotiating a mutually acceptable solution," "using mediation," and "using arbitration"); Lind et al., *supra* note 223, at 275 (presenting participants with descriptions labeled "ignoring the situation," "give in," "persuasion," "negotiation," "mediation," and "arbitration"); Schuller & Hastings, *supra* note 182, at 132 (presenting participants with procedures that were called "mediation," "arbitration," and "adjudication"). *But see* Heuer & Penrod, *supra* note 189, at 703 (presenting participants with procedures labeled "Method 1," "Method 2," "Method 3," "Method 4," and "Method 5").

²⁴⁴ *Id.*

²⁴⁵ Hensler, *supra* note 9, at 86–87. Hensler continues:

Thus, making sense of the literature requires reconciling the descriptions the participants responded to across studies with the labels provided for those descriptions.

This task is challenging because researchers do not seem to pay close attention to the terminology they use to describe their procedures.²⁴⁶ As Deborah Hensler has noted, when researchers include descriptions in their reports, one can sometimes find definitional variations that make drawing conclusions across studies quite difficult:

[Some] experiments that claim to have found a greater preference for mediation compared to binding and advisory adjudication (under some circumstances) turn out to have used descriptions of mediation that better resemble non-binding arbitration than mediation as it is typically used for legal disputes. When researchers describe mediation in a way that aligns with contemporary evaluative mediation, research participants favor adjudication and mediation over other procedures, with similar frequencies.²⁴⁷

In these experiments the third party was a confederate of the researcher who simply followed a script, listening first to the evidence presented by the parties and then rendering a pre-determined and randomly assigned advisory decision. My point is that the process simulated in these experiments looked little like mediation as practiced today, in either its evaluative or facilitative form.

Not all procedural justice researchers have described mediation to participants as outlined in the text. For example, in studies exploring differences in procedural preference across cultures, Leung and colleagues described mediation as a process in which a third party appointed by the court provides the disputants with "guidance and suggestions" as they try to reach a "mutually acceptable solution through negotiation and bargaining."

Id. at 87 n.20 (citation omitted). See Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-Cultural Study*, 53 J. PERSONALITY & SOC. PSYCHOL. 898 (1987). Using a hypothetical dispute concerning a traffic accident, Leung asked participants in the U.S. and Hong Kong to evaluate four procedures: bargaining, mediation, inquisitorial adjudication, and adversarial adjudication. Hong Kong participants strongly preferred mediation to all other procedures, but they preferred adversary adjudication to bilateral bargaining. Americans favored mediation and adversary adjudication equally, and strongly preferred both to inquisitorial adjudication or bargaining. Participants in both cultures perceived adjudication as the fairest procedure. *Id.* at 903. See also Kwok Leung et al., *Effects of Cultural Femininity on Preference for Methods of Conflict Processing: A Cross-Cultural Study*, 26 J. EXPERIMENTAL SOC. PSYCHOL. 373 (1990).

²⁴⁶ Hensler, *supra* note 9, at 94.

²⁴⁷ *Id.*

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Field researchers face labeling challenges as well. Mediation is not conceptualized uniformly across court programs.²⁴⁸ Not surprisingly, usage rates across programs also vary. For example, studies have shown that although most voluntary, opt-in, court-connected mediation programs are not used often, some programs *have* been very successful in attracting disputes. For example, over 70% of all United States Postal Service Equal Employment Opportunity complainants elect to participate in that institution's voluntary mediation program.²⁴⁹ It is unclear why there is such disparity in participation rates.²⁵⁰ Perhaps the difference is due to the driving force of some particular program feature (e.g., style of mediation used, which in this case is transformative mediation). Unless researchers describe in detail the characteristics of the programs they study, it will remain difficult both to discern what disputants evaluated and to reconcile the different findings across studies.

Another possible reason for seemingly conflicting findings regarding preferences relates to the use of the labels themselves (rather than to the mislabeling of procedures). As psychologist Stephen LaTour and his colleagues have argued, exposing participants to labels for procedures can result in distortion due to differential familiarity or biased perception of those procedures.²⁵¹ That is, if participants have a preconceived notion about mediation, for example, they might see the word "mediation" on a

²⁴⁸ Of course, real-life mediations also vary in terms of features and styles, so they should not be described exactly the same way in all studies. Problems arise, however, when mediation is defined in an anomalous way that more closely resembles how arbitration is typically conducted.

²⁴⁹ Lisa B. Bingham, Report, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*, IBM Center for the Business of Government, Human Capital Management Series, Oct. 2003 (describing and summarizing eight years of research on the REDRESS mediation program, based on more than 60,000 surveys). The USPS' REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) program provides mediation for equal employment opportunity (EEO) disputes, specifically those arising out of a claim of discrimination under federal law. *Id.* Studies of the program suggest that at least 90% of the employees and supervisors report they are satisfied or highly satisfied with various aspects of the process and that a substantial majority of all employees and supervisors who have participated are satisfied or highly satisfied with the mediation outcome (on average, 64% and 69% respectively). *Id.* at 23. The program maintains a consistent voluntary complainant participation rate of 70–75%. *Id.* at 15.

²⁵⁰ Welsh, *supra* note 103, at 594–95.

²⁵¹ LaTour et al., *supra* note 182, at 323–24. LaTour defines "bias" in terms of favoring a procedure simply because it happens to correspond to the adversarial Anglo-American tradition, to which participants in studies are probably acculturated.

questionnaire and provide a rating for "mediation" as they personally understand or define it rather than responding to the description that is provided. This potential source of inconsistency in what participants respond to can inject noise into the data, thereby making their interpretation unreliable. Although laypeople are generally more aware of ADR today and less hesitant to express a preference for procedures labeled "mediation," for example, perhaps due to familiarity alone, they do not, as a general matter, accurately distinguish between the various forms of ADR.²⁵² Even some lawyers do not understand the core differences between mediation and arbitration.²⁵³ Such misunderstandings can also cloud data.

Given this problem associated with labeling, it seems methodologically more prudent to offer research participants unlabelled descriptions of procedures or, better yet, a list of options for the core features of procedures (outcome, process, and rules).²⁵⁴ Rather than bundling up the options into configurations and asking participants to evaluate them in labeled packages (e.g., "mediation"), they can be presented with different options for each feature (which I call "feature options") and asked to indicate the attractiveness of each.²⁵⁵ For example, they could be presented with a set of options pertaining to the outcome (e.g., who would determine the final outcome; whether that outcome would be advisory or binding), how the process would evolve (e.g., how informal the process would be; whether

²⁵² Lester H. Berkson, *Mediation and Advising the Client*, 2 NEV. LAW 22 (1994) (arguing that "It is rare that clients understand the mediation process, particularly the substantial difference between mediation, arbitration, and litigation"); Jacqueline M. Nolan-Haley, *Representing Clients in Mediation: Principles that Make a Difference*, 18 ALTERNATIVES TO HIGH COST LITIG. 41 (2000) (suggesting that many lawyers do not understand the conceptual differences between adversarial lawyering and mediation practice). See also Stipanowich, *supra* note 48, at 860–61 (discussing and critiquing "expansive" applications of federal and state arbitration law and making the point that there are still lawyers and judges who, sometimes through ignorance, fail to discriminate; some federal and state court opinions have addressed enforcement of contractual agreements to mediate under the rubric of arbitration law).

²⁵³ See Brown, *supra* note 65, at 329–30; McAdoo & Hinshaw, *supra* note 14.

²⁵⁴ For an explanation of why investigating preferences for rule options (in addition to studying preferences for process and outcome options), see Shestowsky, *supra* note 9. See also Hensler, *supra* note 9, at 95 (noting that "The question of whether (and when) people prefer dispute resolution based on public legal norms to dispute resolution based on ad hoc privately negotiated norms unfortunately has not been subjected to much investigation to date" and explaining why this subject should be studied).

²⁵⁵ For examples of studies using a more direct approval, in the context of laboratory research, see, e.g., Shestowsky, *supra* note 9; LaTour et al., *supra* note 182, at 323.

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disputants could express themselves conversationally or only in response to questions posed by others), and the norms or rules that would be used to resolve the dispute (e.g., whether the law would apply or the parties could decide to use other standards).

This "indirect" analytical approach offers several advantages over a more direct approach.²⁵⁶ One benefit is that it reduces possible distortion from bias and differential familiarity with the various procedures.²⁵⁷ Moreover, it avoids any evaluative implications of specific labels or titles, and therefore facilitates the determination of relative preferences without the potential noise introduced by labels. For that reason, "it makes possible a feature-by-feature examination of the way in which procedures depart from a participants' ideal procedural model."²⁵⁸

This approach to studying preferences has the added benefit of allowing researchers to determine which particular feature options drive preferences for ADR procedures, which can help courts prioritize the implementation of those particular options. Given the decades of research on preferences, it is surprising how little we know with reasonable certainty about what specific feature options disputants value most. The lack of clarity on this issue is due in large part to the inflexible ways in which features have been investigated to date. For example, when process control has been studied in laboratory studies, it has nearly always been described to participants as an opportunity

²⁵⁶ LaTour et al., *supra* note 182, at 323 (describing some advantages). *See also* Shapiro & Brett, *supra* note 184, at 1176 (reporting on labor study and finding that instrumental voice effects can be traced to certain procedural features).

²⁵⁷ LaTour et al., *supra* note 182, at 323. In this study, participants were given a list of options that could be used to resolve their conflict and were asked to indicate which ones they would want incorporated in the procedure used for their conflicts and how important each feature was to them. *Id.* at 327. The following options were studied: (1) opportunity for evidence presentation; (2) desired level of fairness of the procedure; (3) disputant control over outcome; (4) control of third party over outcome; (5) amount of time a settlement should take; (6) certainty of approximation to the "best" possible outcome; (7) certainty of a final decision; and (8) pleasantness of procedure. In order to use this information to determine which procedures the participants preferred, the researchers enlisted law students to match groupings of these options to existing dispute resolution procedures. *Id.* Law students considered the following procedures: arbitration, autocratic (a procedure in which disputants delegate decisionmaking authority to a neutral third party who questions them and then renders a verdict), bargaining (bilateral negotiation without third-party assistance), mediation, and moot (an informal procedure in which all disputants discuss the matter informally and make a unanimous decision). *Id.* at 328–29.

²⁵⁸ *Id.* at 324.

to control the presentation of evidence.²⁵⁹ But in modern practice, different procedures offer disputants a variety of way in which they can control process, for example: by deciding whether to speak to the opposing party directly or indirectly through their lawyers, by deciding how conversational the exchange of information will be, and by deciding when and where the procedure will be held. Despite nearly three decades of research on process control, we still have little knowledge about what aspects of process disputants especially like to control, since this variable has been operationalized in this singular fashion. Future research can make great advancements simply by examining reactions to a wider variety of process control options.

C. Recommendations for Future Research

As the "state of the empirical literature" on procedural preferences presented in this article suggests, some recommendations for future research are in order. First, researchers should conduct a meta-analysis on the existing literature to generate cumulative results and localize statistical trends in the findings across existing studies. A meta-analysis would provide insight into what can be reliably concluded from past research, and identify which variables might need further exploration. In particular, the "timing" factor (ex ante versus ex post preferences) could be explored more reliably by way of a meta-analysis, and if it is found to be statistically significant, it would support the idea that there are two psychologies of dispute resolution.

Second, given that courts generally offer only one procedure, researchers should prioritize clarification of which procedure disputants, in the aggregate, tend to prefer. To accomplish this goal, future research should eliminate some of the ambiguity of past research. To that end, the best way to minimize flawed conclusions about disputants' preferences is to rely on empirical studies conducted on disputants directly, rather than on third-party intuitions about, or reports of, disputants' needs. This can, and should, be accomplished both in laboratory experiments (which are necessary in order to draw conclusions about causal relationships between variables) and field studies (which can support conclusions about ecological validity). Because of their complementary attributes, a deliberate marriage between laboratory studies and field research is essential.

Laboratory researchers should determine which feature options disputants value most. To accomplish this, participants in their studies should

²⁵⁹ Shestowsky, *supra* note 9 (reviewing how the process control variable has been operationalized in past research).

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evaluate unlabeled descriptions of procedures or, better yet, lists of feature options, rather than brief descriptions of procedures that are labeled with procedure names. This methodology would reduce possible distortion from bias and differential familiarity with the various dispute resolution procedures. Further, it would avoid any evaluative implications of specific labels or titles. When reporting their findings, laboratory researchers should also describe their hypothetical dispute scenarios in detail so that consumers of their research can properly interpret the legal, or non-legal, nature of the underlying disputes.

Field researchers could clarify preferences in several ways as well. The biggest contribution they could make would involve conducting preference research using random assignment. Actual disputants could be randomly assigned to either mediation or arbitration, and the two groups could be compared across a multitude of variables. This design could help courts to understand the implications of offering one or the other procedure. Additionally, actual disputants could be randomly assigned to one of two groups—one group randomly assigned to mandatory ADR and another to voluntary ADR (wherein participants could voluntarily select from a menu of the same procedures that would be mandatory for the other disputants). This design would help to disentangle the effects of disputant choice, which can help courts understand the implications of choosing between a mandatory or voluntary program. Courts with multi-option ADR programs are ideal existing "laboratories" for this kind of research.

Field researchers should also describe in detail the features of the programs for procedures they study so that consumers of their reports can attempt to reconcile any different findings that might surface across studies.²⁶⁰ Importantly, they should begin to investigate the potential differences between *ex ante* and *ex post* preferences for actual legal disputes, which may differ considerably and may implicate the values that courts seek to promote in designing their ADR programs. This would involve conducting longitudinal field research that assesses pre-experience and post-experience judgments for the very same dispute. This type of research is notably missing from the published literature.

Courts can, and should, be more involved in advancing the research agenda on disputants' preferences. They can do so by gathering evaluation data from disputants directly, and using it to shape their programs to better respond to disputants' needs. If disputants modify procedures to suit their

²⁶⁰ For recommendations specific to mediation, see Shack, *supra* note 209, at 11–12 (providing recommendations for future research on mediation programs that could help to illuminate which program and case characteristics make mediation most effective).

needs, courts should also keep a record of these modifications and use them as variables to statistically assess how much they affect preferences. Courts can also advance the research agenda by welcoming academic researchers who would like to study their programs for purposes other than straight-forward program evaluation.²⁶¹

Naturally, it would be valuable to replicate studies from both the laboratory and field paradigms in multiple locations around the country to obtain more clarity on the reliability and generalizability of findings. It is also essential that courts understand the limitations of the existing body of research and how to meaningfully rely on the findings to improve their programs.

IV. CONCLUSION

As Psychologist Tom Tyler has argued: "Legal authorities can both do their jobs well and create public satisfaction. The key is to have a clear understanding of what people want from the courts . . . The first issue involved in knowing what citizens want from the courts is to examine their preferences concerning how disputes should be resolved." The second issue is for courts to implement those preferences, as I argue here. If courts implement disputants' preferences, once such preferences are better understood, we can expect voluntary court ADR programs to be used more often, mandatory programs to be viewed as more palatable, and both voluntary and mandatory programs to enjoy greater success in terms of party self-determination, procedural justice, and compliance with outcomes. It should also lead to greater respect for the legal system. These anticipated benefits should motivate researchers and courts alike.

An interesting dilemma would arise if research ultimately unveils substantial differences in ex ante and ex post preferences. If disputants have preferences for certain procedures or feature options early on in the resolution process, but then value them differently afterwards, courts will face the dilemma of which findings to consider foremostly when they design their programs. In such a scenario, it could be that courts with voluntary programs that want to increase participation would focus on incorporating options that look attractive ex ante. By contrast, courts with mandatory

²⁶¹ JAMES L. SORENSEN ET AL., *DRUG ABUSE TREATMENT THROUGH COLLABORATION* 90–93 (2003) (comparing local versus contracted court research in terms of objectivity, scientific merit, and bias stemming from political influence and noting that courts are "more amenable to listening to outside research when researchers provide evidence that can be used to support their cause").

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programs that want to maximize the likelihood of outcome compliance may opt to focus on findings that demonstrate what is valued most *ex post*. We need to obtain a clearer understanding of whether (and how) preferences for the same dispute differ over time so that courts can understand how to interpret past studies which report preferences for only one point in the dispute resolution trajectory. Clarification of temporal changes in preferences can also help courts to appreciate the tradeoffs they are making when they focus on disputants' needs at one or another point in that trajectory.

As Lisa Bingham has argued, "The jury is still out on what dispute system design is best . . . in a court setting. Courts could . . . essentially let the disputants answer it."²⁶² Indeed they could. They could rely on aggregate data on preferences to determine which procedures to offer, once research clarifies what these preferences are. More immediately, they could build flexibility into their programs so that parties can exercise some of their preferences on a case-by-case basis. By granting disputants' preferences significant weight, either at the program design level, at the case-level or both, courts can uphold the original goals of ADR and advance the potential that ADR has for the future.

²⁶² Bingham, *supra* note 37, at 125–26.

